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No._____

In The

Supreme Court of the United States

OCTOBER TERM, 1983

LIBERTARIAN PARTY OF LOUISIANA,

Petitioner,

VS.

JAMES H. BROWN, SECRETARY OF STATE FOR THE STATE OF LOUISIANA, AND EDWIN A. LOMBARD, CLERK OF THE CRIMINAL DISTRICT COURT FOR THE PARISH OF ORLEANS, STATE OF LOUISIANA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. WHAT IS THE PROPER STANDARD OF REVIEW TO USE IN EVALUATING THE CONSTITUTIONALITY OF A STATE BALLOT ACCESS LAW WHICH DISCRIMINATES AGAINST MINOR POLITICAL PARTIES BY PROHIBITING BALLOT DESIGNATION OF PARTY AFFILIATION FOR THEIR CANDIDATES?

2. DOES THE LOUISIANA ELECTION CODE UNCONSTITUTIONALLY DENY BALLOT ACCESS TO MINOR PARTIES BY EXCLUDING SUCH PARTIES FROM BALLOT DESIGNATION IN ALL STATE AND LOCAL ELECTIONS UNLESS A PARTY CONSTITUTES FIVE (5%) PERCENT OF STATEWIDE VOTER REGISTRATION OR HAS RECEIVED AT LEAST FIVE (5%) PERCENT OF THE VOTES CAST STATEWIDE IN THE LAST PRESIDENTIAL ELECTION?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 717 F.2d 1491 (5th Cir. 1983) and is set forth in the Appendix to this petition at Page 1. The memorandum opinion of the United States District Court for the Eastern District of Louisiana is reported at 531 F.Supp. 135 (E.D. La. 1982) and is set forth in the Appendix to this petition at Page 76.

JURISDICTION

The judgment of the Court of Appeals was entered on October 24, 1983. A timely Petition for Rehearing was denied on December 12, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The statutes challenged by petitioner are cited La. R.S. 18:441 and La. R.S. 18:551(D)

and (E), and are set forth in the Appendix at Pages 147-153. Also involved by comparison is La. R.S. 18:1259(B), which is set forth in the Appendix at Pages 147-157.

Petitioner's challenge is based on the First and Fourteenth Amendments to the United States Constitution and on Article I, Section 3 of the Louisiana Constitution of 1974. These constitutional provisions provide in pertinent part:

First Amendment

> Congress shall make no law... abridging the freedom of speech... or the right of the people peaceably to assemble and to petition the Government for a redress of grievances.

Fourteenth Amendment

> Section 1. ... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * * *

Article I, Section 3,
Louisiana Constitution of 1974

§ 3. Right to Individual Dignity

Section 3. No person shall be denied the equal protection of the laws. No law shall discriminate against a person because of race or religious ideas, beliefs, or affiliations. No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, sex, culture, physical condition, or political ideas or affiliations. ...

STATEMENT OF THE CASE

1. This Action

Henry T. Dart and the Libertarian Party of Louisiana filed this suit against the Secretary of State of the State of Louisiana, James H. Brown, and the Clerk of the Criminal District Court of the Parish of Orleans, Edwin A. Lombard, in the United States District Court for the Eastern District of Louisiana on January 11, 1982.

In the first count of their complaint plaintiffs asserted a claim under the First

and Fourteenth Amendments of the United States Constitution and 42 U.S.C. §1983 alleging that §§441 and 551 of the Louisiana Election Code (Title 18 of the Louisiana Revised Statutes) were unconstitutional in that they denied to the Libertarian Party of Louisiana, its candidates, and its supporters equal protection of the laws by requiring that candidates duly nominated and qualified as candidates of the Libertarian Party in local elections be listed on the official ballots without their bona fide party affiliation -- "Libertarian" -- but rather with an indication of no party affiliation, in contrast to candidates of the Democratic and Republican parties, whose party designations are printed on the ballots.

Dart, who had recently qualified to run for the office of New Orleans City Councilman, and the Libertarian Party sought injunctive and declaratory relief ordering the state officials charged with preparing the election ballots to place the words "Libertarian Party"

after Dart's name on the ballot or, alternatively, to place no party affiliations after the names of any candidates on the ballot.

In a second count the plaintiffs alleged that Louisiana's refusal to accurately identify Dart's party affiliation on the ballot was a violation of Article I, §3 of the Louisiana Constitution of 1974 as an arbitrary, capricious, and unreasonable discrimination based on political ideas or affiliations. The second count sought the same relief as the first.

Count One of the complaint founded the jurisdiction of the court on 28 U.S.C. §1343, and Count Two asserted the pendent jurisdiction of the United States District Court to resolve the claim arising under the Louisiana Constitution. Federal jurisdiction for this matter is also conferred by 28 U.S.C. §1331.

On January 22, 1982 the plaintiffs filed an amended complaint adding a third count and the additional defendants Jerry Fowler in his

capacity as Commissioner of Elections of the Louisiana Department of Elections and Registration and in his capacity as a member of the Louisiana State Board of Election Supervisors; William J. Guste, Jr., Attorney General of Louisiana, in his capacity as a member of the State Board of Election Supervisors; and James H. Brown in his capacity as a member of the same Board. The new count realleged the contentions of the original complaint and added a claim that various of the defendants were engaged in activities which denied the Libertarian Party of Louisiana a fair opportunity to become qualified as a "recognized party" under the Louisiana Election Code, in violation of plaintiffs' constitutional rights.

2. The Louisiana Statutes

The Louisiana Election Code provides an "open primary" system for all state and local elections. All candidates participate in a

common primary election in which all voters are eligible to vote, regardless of party affiliation. The "general election" is merely a runoff election held when no candidate wins a majority in the primary.

La. R.S. 18:441 (Appendix, Page 147) provides that a political party shall be considered a "recognized" political party in Louisiana "if one of its candidates for presidential elector received at least five percent of the votes cast [statewide] for presidential electors in the last presidential election, or if at least five percent of the registered voters in the state are registered as being affiliated with the political party." (emphasis supplied)

The main result of being classified as a recognized party under Louisiana law, other than the prescription and provision of an elected party management structure, is that candidates of recognized parties are listed on all ballots as being affiliated with their

designated political parties, while candidates of non-recognized parties are characterized on all election ballots and in most State records as having no party affiliation.

La. R.S. 18:551 (Appendix, Pages 147-153) provides for the preparation of election ballots. Paragraphs (D) and (E) of §551 provide in pertinent part:

> D. Political party designation. The political party designation of a candidate who is registered as being affiliated with a recognized political party shall be printed on the primary or general election ballot on the same line and immediately after or below the candidate's name. If a candidate is not affiliated with a political party, the space after his name shall be left blank.
>
> E. Uniformity. Except as specifically authorized in this Section, no information, designation, or title shall be printed on the ballot. ...

In contrast to the party designation rule for state and local elections, the Louisiana Election Code permits designation of party affiliation for all candidates in the presidential election. La. R.S. 18:1259(B), (Appendix, Pages 154-156). Section 1259(B)

produces this result by allowing presidential and vice presidential candidates nominated by non-recognized parties to have "the political principal (sic)" they support printed next to their names on the ballot.

3. The Trial

On January 29, 1982 plaintiffs' suit was tried to The Honorable Robert F. Collins, Judge of the United States District Court for the Eastern District of Louisiana.

The evidence at trial showed that there is a national Libertarian Party in the United States, and that the Party is organized in all fifty states. In 1980 the Party nominated Ed Clark for president and his name was on the ballot in every state. Clark received 8,240 votes of 1,548,591 votes cast for president in Louisiana, or approximately .53 percent of the total.

It was shown that the Libertarian Party of Lousiana is duly organized with a constitu-

tion, by-laws, and a State Central Committee, and that the Party has an annual convention. The evidence showed that Henry T. Dart was nominated by the Libertarian State Central Committee to run for the New Orleans City Council, and that he qualified for his candidacy, as did the other candidates for the office, by paying a qualifying fee and filing a Notice of Candidacy with Defendant Lombard.

The Notice of Candidacy required Dart to check one of three party designations: "member of the Democratic Party", "member of the Republican Party", or "not affiliated with a recognized political party". Dart checked the last box and typed in "Libertarian Party" next to it.

Four other candidates qualified for the councilman race in Dart's district. All were Democrats. The certification of qualified candidates sent by Defendant Lombard to the Secretary of State, whose responsibility it

was to make up the ballots, gave the party designation of Dart's four opponents as "Democrat". It gave Dart's as "No Party". The ballot prepared by the Secretary of State listed the Democratic affiliation of each of Dart's opponents, but it showed no party affiliation for Dart.

There was further evidence adduced at trial that some members of the Libertarian Party had had difficulty getting local voting registrars to record their party affiliations as "Libertarian" or had been told that it was not possible to register as "Libertarian".

A member of the Libertarian State Central Committee, Wade Brisbin, testified that the Libertarian Party wanted its name to be placed on the ballot because party labels help to identify and communicate to the public the philosophy and principles a candidate stands for. He testified that the Libertarians wanted the same opportunity enjoyed by Republicans and Democrats to identify their

candidates with the Party's principles. Brisbin said the Libertarian Party had been seeking recognized status in Louisiana but had been unable to attain either the presidential vote qualification or the voter registration qualification of R.S. 18:441.

The Director of Voter Registration for the State of Louisiana, Louis Bruder, testified that as of September 30, 1981 the total number of registered voters in Louisiana was 1,942,241. Five percent of this figure would be 97,147, the number of voter registrations the Libertarian Party would have to gain in Louisiana under R.S. 18:441 in order to become recognized through voter registration. Bruder further testified that although his office formerly recorded voter registration figures for minority parties as reported by the parish registrars, it no longer tabulated such figures, and currently reported voter registration only by the categories "Democrats", "Republicans", and "Other Registrants". As of

September 30, 1981 Bruder's records showed 117,920 "Other Registrants" or about 6.07 percent of the total; but he could not say how many of those were Libertarians without polling all of the individual parish registrars. According to Bruder, no party other than the Democratic and the Republican parties had qualified as a recognized party in Louisiana for many years.

The District Court ruled in favor of the defendants, holding that since Dart was personally on the ballot, there was no significant infringement of plaintiffs' constitutional rights. Though concluding there was "some denial of equal protection in the whole procedure" (Oral reasons for judgment, January 29, 1982), the Court ruled that the Louisiana party designation provisions constitute a reasonable means of reducing electoral confusion and cause no undue burden on minor political parties. The Memorandum Opinion of the District Court is reproduced in the Appendix at Pages 76-92.

4. The Appeal

The Libertarian Party of Louisiana appealed the decision of the District Court to the United States Court of Appeals for the Fifth Circuit. The opinion of the Court of Appeals, which contains further factual detail on the case, is given in the Appendix at Pages 1-75. Noting that its holding may be inconsistent with that of the Court of Appeals for the Eighth Circuit in McLain v. Meier, 637 F.2d 1159 (8th Cir. 1980), the Fifth Circuit held that the proper standard of review did not require "strict scrutiny" of the Louisiana statutory system. The Court's basic premises for this conclusion were apparently its opinions: (1) that the ballot access jurisprudence of the United States Supreme Court, from Williams v. Rhodes, 393 U.S. 23, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968), to Anderson v. Celebrezze, --- U.S. ---, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983), provides no more support

for the associational, communicational, and voting rights of minor political parties than that represented by the ability of their candidates to be listed on a ballot without party designation; and (2) that since Dart personally was granted access to the ballot, so was the Libertarian Party.

The Party timely petitioned the Court of Appeals for a rehearing, but the petition was denied.

In view of the many conflicts expressed by the opinion of the Court of Appeals for the Fifth Circuit with the jurisprudence of the Supreme Court and of other Courts of Appeals, and in view of the great importance of clear judicial resolution of issues at the heart of our democratic system and electoral process, the Libertarian Party of Louisiana respectfully submits this petition and the following argument to the Supreme Court.

REASONS FOR GRANTING THE PETITION

1. The Supreme Court Should Grant Certiorari to Clarify an Important Area of Constitutional Law.

The jurisprudence of the Federal Courts on the subject of voting rights and ballot access, reckoning only from 1968, has been very extensive.

It is often observed that:

> Restrictions on access to the ballot burden two distinct and fundamental rights, "the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively." Williams v. Rhodes, supra, 393 U.S. at 30, 89 S.Ct. at 10. The freedom to associate as a political party, a right we have recognized as fundamental, see 393 U.S., at 30-31, 89 St.Ct. at 10, has diminished practical value if the party can be kept off the ballot. Access restrictions also implicate the right to vote because absent recourse to referendums, "voters can assert their preferences only through candidates or parties or both." Lubin v. Panish, 415 U.S. 709, 716, 94 S.Ct. 1315, 1320, 39 L.Ed.2d 702 (1974).

Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. 173, 184, 99 S.Ct. 983,990, 59 L.Ed.2d 230 (1979).

The seriousness of the values involved in the regulation of elections has required the development of somewhat ambiguous standards for testing the balances of rights involved. The grounding of ballot access rights in both the First Amendment associational and democratic values, on the one hand, and also on the Equal Protection Clause, on the other, illustrates the way in which differing rationalizations arise to measure the constitutionality of legislative enactments alleged to have overburdened the rights of minority political parties and independent candidates. See the concurring opinions of Justice Blackmun and Justice Stevens in Illinois State Board of Elections v. Socialist Workers Party, supra, concerning the standard of review in such cases, and see also footnote 7 in Anderson v. Celebrezze, --- U.S. ---, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983), Page 6 of the Slip Opinion.

Anderson v. Celebrezze, supra, offered a weighing process to evaluate challenges to State election laws. One must evaluate the character and magnitude of the asserted injury, identify and evaluate the precise interests put forward by the State to justify the challenged procedures, weigh these considerations against alternatives, and arrive at a conclusion of whether or not "the challenged restriction unfairly or unnecessarily burdens the availability of political opportunity." Anderson v. Celebrezze, supra, at Pages 8-13 of the Slip Opinion.

The issues that are presented by Dart v. Brown, (Appendix, Page 1), are at the very least subject to differing resolutions based on one's image of "reasonableness" as to the competing interests involved.

At the core of Dart v. Brown is the issue of the kind of distinction to be made between the rights of candidate access and those of party access. Candidate access implies the

ability of candidates, whether partisan or independent, to get on ballots, whether by means of nominating petitions or party nomination procedures. Party access refers to the collection of issues determining the rights of political parties to be allowed to communicate and compete in the political process. Intrinsic to the notion of party ballot access is the presentation of candidates to the voters with their party affiliations identified.

The Fifth Circuit appears not to have come effectively to grips with this distinction in Dart. Note the expressions of doubt and uncertainty made by the Court of Appeals concerning the following aspects of the case: (1) the impact on a candidate or minor party of denying a party label on the ballot (Slip Opinion, Page 363; Appendix, Pages 51-54); (2) the burden caused to small or local parties by Louisiana's requirement that in order to be able to have party designation on the ballot such a party must obtain five per-

cent of the statewide voter registration, approximately 97,174 registered voters; and (3) the issue of excessiveness of Louisiana's party recognition restrictions (Slip Opinion, Page 369; Appendix, Pages 73-75).

Petitioner submits that the jurisprudential conflicts surrounding these matters, as evidenced by the lengthy Dart opinion, and by the matters to be raised in this petition, warrant the granting of certiorari herein in order to clarify the legal principles in contest.

2. The Holding of the Court of Appeals on the Question of the Standard of Review to Use is in Conflict with the Decisions of the Supreme Court and Other Federal Courts.

The Court of Appeals ruled that a "strict scrutiny" standard for reviewing the questions raised in Dart is inappropriate. The Court's basic rationale seems to be that the barrier erected by Louisiana's party recognition statute (La. R.S. 18:441; Appendix, Page 147) to new party ballot access is too "minor, indirect, and remote," or too "indirect

attenuated, and slight" (Slip Opinion, Pages 363-4; Appendix, Pages 49-54), to justify requiring the State to show a compelling reason for it. But this approach is inconsistent with the more demanding standards announced by Williams v. Rhodes, 393 U.S. 23, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968); Bullock v. Carter, 405 U.S. 134, 92 S.Ct. 849, 31 L.Ed.2d 92 (1972); Lubin v. Panish, 415 U.S. 709, 94 S.Ct. 1315, 39 L.Ed.2d 702 (1974); Storer v. Brown, 415 U.S. 724, 94 S.Ct. 1274, 39 L.Ed.2d 714 (1974); Illinois State Board of Elections v. Socialist Workers Party, supra; and Anderson v. Celebrezze, supra.

Dart v. Brown is in direct conflict with McLain v. Meier, 637 F.2d 1159 (8th Cir. 1980), as to the standard of review to be applied in party access cases. The plaintiff in McLain complained of party access rules that burdened his right to obtain a separate partisan presentation on the North Dakota ballot. Applying a strict scrutiny standard

the McLain Court invalidated the challenged ballot access provisions even though the State provided a very easy means of candidate access (300 signatures) and even though, as an independent candidate, McLain was allowed to have his party label on the ballot.

The burdens on the plaintiff in McLain -- merely not being granted a separate party column (which, easier partisan access provisions would have given him) -- were far lighter than those imposed on Henry Dart and the Libertarian Party in Louisiana. Nevertheless, the Eighth Circuit properly employed a "strict scrutiny" analysis with them because of their impact on the fundamental rights of ballot access. The ballot format issues also addressed by the McLain Court indicate the kinds of issues suitable for resolution under a "rational basis" test.

The rights of minority parties and their roles in the functioning of the American democracy are of such fundamental importance

under our Constitution that the balancing process mandated by Anderson and its predecessors requires that burdens on such rights be weighed very carefully and not with the relatively indifferent attitude expressed by the Fifth Circuit in Dart.

Several recent Federal court cases illustrate what, petitioner submits, is the proper standard of review to be employed with party ballot access restrictions of the kind dealt with herein.

In Baer v. Meyer, 728 F.2d. 471 (10th Cir. 1984), the Court of Appeals for the 10th Circuit dealt with a challenge brought by representatives of the Libertarian Party and the Citizens Party against a Colorado statute which barred local voting registrars from recording the party affiliation of voters affiliated with minor parties. Besides showing the constitutional value of addressing the organizational needs of minor parties, Baer correctly utilized the Anderson test of

weighing the unfair or unnecessary impacts on political opportunity caused by the restrictive measures.

In Blomquist v. Thomson, --- F.Supp. --- (D. Wyo. Feb. 17, 1984), Appendix, Pages 94-128; Libertarian Party of South Dakota v. Kundert, 579 F.Supp. 735 (D. S.D., 1984); and Reagan v. Kansas, (unreported), No. 82-4083 (D. Kan. June 16, 1982), Appendix, Pages 129-146; three different District Courts subjected party ballot access restrictions to strict scrutiny, holding them unconstitutional in view of the absence of compelling State justifications for unduly burdensome provisions.

3. The Court of Appeals Erred in Evaluating the Constitutionality Of the Challenged Statutes.

Petitioner strongly urges that the Court of Appeals erred in applying whatever standard of review it chose to use. In its evaluation of the constitutionally significant issues in Dart it erred in not appreciating the charac-

ter of the rights asserted by the plaintiffs and in giving excessive dignity to considerations of countervailing State interests as to which less burdensome and more reasonable alternative regulatory devices are available.

Petitioner submits that this Court has always been sensitive to the separate significance of party access and candidate access to the electoral process. As the Court observed in Storer v. Brown, supra,

> ...the political party and the independent candidate approaches to political activity are entirely different and neither is a satisfactory substitute for the other.

415 U.S. at 745, 94 S.Ct. at 1286.

To withstand scrutiny under the First and Fourteenth Amendments, ballot access restrictions must prejudice neither the rights of those who seek to preserve their independence from parties nor the rights of those who choose to associate with others in political parties. It is unconstitutional either to require a bona fide independent candidate to

assume a partisan affiliation in order to participate in elections, or to require a bona fide partisan candidate (with reasonable indicia of seriousness or popular interest) to masquerade as an independent. Illinois State Board of Elections v. Socialist Workers Party, supra; McCarthy v. Briscoe, 429 U.S. 1317, 97 S.Ct. 10, 50 L.Ed.2d 49 (1976); Lubin v. Panish, supra; Storer v. Brown, supra; Bullock v. Carter, supra.

The importance of party access vis a vis candidate access can be seen in cases which disapproved unduly burdensome party access rquirements despite the availability of liberal independent candidate ballot access provisions.

In Reagan v. Kansas, supra, (Appendix, Page 129) the Court was faced with a party access provision that was very discriminatory toward recently formed parties. The existence of a petition alternative which provided fairly easy ballot access for independent candidates

did not save the discriminatory party access provisions from condemnation.

In Libertarian Party of South Dakota v. Kundert, supra, a party access provision that bound the signers of an access petition to join the new party was held unconstitutionally burdensome on the organizational rights of new parties. The existence of a lenient independent candidate access provision based on a voters' petition did not make the party discrimination more acceptable.

North Carolina Socialist Workers Party v. North Carolina State Board of Elections, 538 F.Supp. 864 (E.D.N.C. 1982), was a similar case, in which a "disaffiliation" obligation, requiring signers of a party access petition to change their voter registration, was struck down despite the existence of a petition alternative for independent candidate access that didn't have the disaffiliation feature.

Blomquist v. Thomson, supra, (Appendix, Page 94), presented a statutory scheme that

effectively barred new parties from immediate ballot access regardless of their apparent popularity. Citing McLain v. Meir, supra, the Blomquist Court stated:

> A minor political party's rights are not adequately protected where the state '...is willing to encourage minority political voices, but only if they are partially stripped of a legitimizing party label.'

Blomquist v. Thomson, supra, (Appendix, Pages 125-126).

Baer v. Meyer, supra, and McLain v. Meier, supra, reflect the same concern for safeguarding reasonable ballot access for political parties no less than for independent candidates.

In all of the mentioned cases the judges were concerned with making a realistic assessment of the threat posed to minor political parties by the ballot restrictions, comparing any such threats with the competing interests of the State, and considering whether under all the circumstances less burdensome procedures would suffice as well to protect the interests claimed by the State.

The Dart Court made several constitutional miscalculations in analyzing the rights of the plaintiffs herein. The Court insisted that since Henry Dart as an individual had attained a position on the ballot, the Libertarian Party had thereby achieved adequate protection of its rights of political association. Dart v. Brown, supra, Slip Opinion, Page 357; Appendix, Pages 28-30. Similarly the Court insisted that the rights of the electorate, including the supporters and sympathizers of plaintiffs, to be able to vote effectively were not impaired by Louisiana's party recognition law. Id., Slip Opinion, Pages 357 and 363; Appendix, Pages 29-30 and 50. The Court even maintained that the absence of party affiliation on the ballots of Libertarian candidates in Louisiana does not suggest to the voters that the candidates are unaffiliated. Id., Slip Opinion, Page 358; Appendix, Pages 34-35. The Court summarized its observations on these matters by stating that

the challenged Louisiana statutes do not require candidates of minor parties to "fly under false colors." Id., Slip Opinion, Page 359; Appendix, Page 35.

All of these conclusions of the Court are belied by common sense. A political party grows by the identification of its candidates and programs in the public eye. The educational and communicative aspects of partisan activity are largely ignored by equating independent candidate access to ballots with meaningful party access.

It is also self-evident that as political parties become more familiar to the public, sympathetic voters will be drawn to their candidates because of their party labels. In Louisiana a major-party voter who is not highly familiar with a particular candidate may have the benefit of knowing the candidate's political party in helping him make his vote decision.

Furthermore, to require a partisan candidate to stand for election without a party label along with candidates of major parties whose parties are identified cannot fail to lead many voters to the conclusion that the candidate is indeed independent. In other words, Louisiana does require "false colors" of minor party candidates.

The Dart Court was unrealistic as well in evaluating the size of the barrier to new party recognition created by La. R.S. 18:441. The Fifth Circuit implies that requiring a voter to change his registration is not significantly more difficult than requiring him to sign a petition. Dart v. Brown, supra, Slip Opinion, Page 366; Appendix, Page 63. Cf. North Carolina Socialist Workers Party v. North Carolina State Board of Elections, supra, and Libertarian Party of South Dakota v. Kundert, supra.

It is well settled that States may require "some preliminary showing of a significant modicum of support" before granting ballot access to new political parties. Jenness v. Fortson, 403 U.S. 431, 91 S.Ct. 1970, 29 L.Ed.2d 554 (1971).

> Of course, what is demanded may not be so excessive or impractical as to be in reality a mere device to always, or almost always, exclude parties with significant support from the ballot. The Constitution requires that access to the electorate be real, not 'merely theoretical.' Jenness v. Fortson, 403 U.S. 431, 439, 91 S.Ct. 1970, 1974 (1971).

American Party of Texas v. White, 415 U.S. 767, 763, 94 S.Ct. 1296, 1307 (1974).

When La. R.S. 18:441 and La. R.S. 18:551 (D) and (E) are considered against the Jenness standard, they are seen to be very severe requirements for party recognition. The presidential vote alternative is only available every four years, and it will have no relevance at all to a party not fielding a presidential candidate.

The five percent voter registration route to party recognition is an extremely difficult condition to satisfy. The much greater difficulty of securing a change in voter registration compared to a signature on a petition is one problem. A second striking difficulty is that small parties running candidates in local or district elections are still required to amass some 97,000 registered voters in order to have partisan ballot access.

The Court may take judicial notice that on September 11, 1982 in the Sixth Congressional District of Louisiana, James D. Agnew, the candidate of the Libertarian Party, polled 19,354 votes of 84,623 votes cast, or approximately twenty-three (23%) percent.

Petitioners submit that it is most unlikely that any rational measure of "a modicum of support" would fail to qualify the Libertarian Party of Louisiana for recognition on Louisiana ballots. Moreover the discrimination that Louisiana law makes between the

presidential election and all others with regard to party ballot access suggests, without more, that the Louisiana scheme lacks even a rational basis. (See La. R.S. 18:1259(B), Appendix, Pages 154-156.)

At Pages 158-163 of the Appendix is a table prepared by Richard Winger of the Libertarian Party showing the major requirements that a new party must meet in every state in order to be qualified to run its candidates for statewide office with party affiliation indicated on the ballot. It will be seen that only three states condition such ballot access on obtaining a certain number of voter registrations as opposed to petition signatures. Of these, Louisiana's requirement is by far the most difficult to accomplish. In fact, the Louisiana requirement appears to be the most restrictive party ballot access law in the nation.

Petitioner submits that a realistic analysis of the Louisiana party recognition

statutes is that their only purpose is to reduce partisan competition by keeping any party labels but Democratic and Republican off the ballots. Far from encouraging voter confusion, designation of party affiliation for bona fide minor party candidates can only increase the useful information available to the voter.

Petitioner submits that there is neither a compelling state interest nor even a rational basis for suppressing party names in this fashion. The availability of nominating petitions as a less burdensome yet effective alternative points to the same conclusion. La. R.S. 18:441 and La. R.S. 18:551 (D) and (E) unfairly and unnecessarily burden the availability of partisan political opportunity in Louisiana.

CONCLUSION

Petitioner, the Libertarian Party of Louisiana, prays that the Supreme Court issue a Writ of Certiorari directed to the United States Court of Appeals for the Fifth Circuit to review the judgment of the Court of Appeals herein.

RESPECTFULLY SUBMITTED:

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83-1917

No._____

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In The
Supreme Court of the United States
OCTOBER TERM, 1983

LIBERTARIAN PARTY OF LOUISIANA,

Petitioner,

VS.

JAMES H. BROWN, SECRETARY OF STATE FOR THE STATE OF LOUISIANA, AND EDWIN A. LOMBARD, CLERK OF THE CRIMINAL DISTRICT COURT FOR THE PARISH OF ORLEANS, STATE OF LOUISIANA,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Henry T. Dart and the Libertarian Party of Louisiana,
Plaintiffs-Appellants,

v.

James H. BROWN, Secretary of State for the State of Louisiana, et al.,
Defendants-Appellees.

No. 82-3146.

United States Court of Appeals,
Fifth Circuit.

Oct. 24, 1983.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before TUTTLE*, POLITZ and GARWOOD, Circuit Judges.

GARWOOD, Circuit Judge:

Appellants, Henry T. Dart and the Libertarian Party of Louisiana, brought this suit seeking both injunctive relief and a declaration that certain sections of the Louisiana Election Code were unconstitutional. Finding that the Code sections in

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*Circuit Judge of the Eleventh Circuit, sitting by designation.

question, restricting the notation on the ballot of a candidate's affiliation with an "unrecognized" political party, were constitutional, the district court, following a bench trial, granted judgment for the defendants. We affirm.

On December 18, 1981, Henry T. Dart, a registered member of the Libertarian Party of Louisiana, qualified to run for election to the New Orleans City Council, District B. The preprinted notice of candidacy form, prepared by the office of James Brown, the Secretary of State, contains three boxes concerning party affiliation, one of which the candidate must check. After the phrase, "I am," the candidate must check the box labeled "a member of the Democratic Party," the box labeled "a member of the Republican Party," or the last box, labeled "not affiliated with a recognized political party." Dart checked the box indicating that he was not affiliated with either recognized party (Democratic and Republican),

and then typed in "Libertarian Party" next to that box. On December 21, 1981, Edwin Lombard, Clerk of the Criminal District Court for the Parish of Orleans, certified to Brown the candidates qualified for election. Dart was among them.

The certification form which Lombard submitted to Brown listed the political affiliation of each of the five candidates for the office in question, except Dart, as Democrat. Next to Dart's name was "NP," signifying that Dart was affiliated with no "recognized" party.

Dart wrote to Brown and Lombard on January 4, 1982, and demanded that the designation "Libertarian Party" be placed after his name on the City Council election ballot. Melvin Bellar, Legal Counsel for the Office of the Secretary of State, responded on January 7, 1982, that because the Libertarian Party was not a "recognized political party" as defined in LSA-R.S. 18:441, Brown was not authorized,

under LSA-R.S. 18:551 D and E, to print Dart's party designation on the ballot and did not intend to do so.

On January 11, 1982, Dart and the Libertarian Party filed this lawsuit against Brown and Lombard under 42 U.S.C. § 1983.[1] The appellants alleged that LSA-R.S. 18:441, 18:551 D, and 18:551 E violated the First and Fourteenth Amendments to the United States Constitution, and article 1, section 3, of the Louisiana Constitution.[2] Dart and the

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[1]Appellee Lombard, Clerk of the Criminal District Court for the Parish of Orleans, asserts that the district court should have granted his Fed.R.Civ.P. 12(b)(6) motion to dismiss the action against him for failure to state a claim upon which relief could be granted. He alleges that because the Secretary of State prepares and certifies the ballots, LSA-R.S. 18:551(A), the Clerk cannot be responsible for their organization and composition. Because Lombard failed, however, to file a cross-appeal on this issue, we are not at liberty to consider it. Champagne v. Chevron, U.S.A., Inc., 605 F.2d 934, 936 (5th Cir.1979).

[2]The equal protection clause of the Louisiana Constitution, article 1, section 3, was intended to be a restatement of the equal protection clause of the United States Constitution. Our analysis of the appellants' federal protection claims is similarly applicable to the cause of action stated under the State Constitution. Burmaster v. Gravity Drainage

Libertarian Party sought a declaration that the statutes were unconstitutional, as well as an injunction requiring the appellees to either designate Dart's party affiliation ("Libertarian") on the ballot or remove all candidates' party affiliations from the ballot. By consent of the parties, trial on the merits was consolidated with the hearing on preliminary injunction, and on January 29, 1982, the district court heard the case. On February 3, 1982, the court entered judgment denying the request for the preliminary injunction and dismissing the suit. In its opinion filed the same day the court held that the Louisiana statutes did not violate the appellants' constitutional rights.[3]

District No. 2, 366 So.2d 1381, 1386 (La.1978).

[3]Although this election is history, the case brought by Dart and the Libertarian Party is not moot. Because the Louisiana Election Code will affect candidates and parties in similar situations in future elections, this case presents a controversy "capable of repetition, yet evading review." Storer v. Brown, 415 U.S. 724, 737 n. 8, 94 S.Ct. 1274, 1282 n. 8, 39 L.Ed.2d 714 (1974)

THE LOUISIANA STATUTORY SCHEME AS APPLIED TO APELLANTS

It is undisputed that Dart qualified to run in the February 6, 1982 New Orleans City Council "primary" election, and that his name was on the ballot in that election.

That ballot, however, did not designate Dart's political affiliation, although the party affiliation of Dart's four opponents was indicated by the word "Democrat," placed in small type beneath each of their names. The equivalent space under Dart's name on the ballot was left blank. The ballot was prepared in conformity with LSA-R.S. 18:551 D, which provides:

> "D. Political party designation. The political party designation of a candidate who is registered as being affiliated with a recognized political party shall be printed on the primary or gen-

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(citing Rosario v. Rockefeller, 410 U.S. 752, 756 n. 5, 93 S.Ct. 1245, 1249 n. 5, 36 L.Ed.2d 1 (1973)). Accord, Anderson v. Celebrezze, ----U.S. ----, ---- n. 3, 103 S.Ct. 1564, 1567 n. 3, 75 L.Ed.2d 547, 554-55 n. 3 (1983). The record does not show the results of the election, although it is evident that the parties have proceeded on the assumption that Dart lost and was not a candidate in any general election for the position.

eral election ballot on the same line and immediately after or below the candidate's name. If a candidate is not affiliated with a political party, the space after his name shall be left blank." (Emphasis added.)

Dart's political affiliation with the Libertarian Party was not placed on the ballot because the Libertarian Party was not then, and is not now, a "recognized" party in Louisiana.

Louisiana schedules elections for different classes or groups of elective offices at different times, but for nearly all such offices, other than presidential elector, there is a "primary" election and, if necessary, also a "general" election. §§ 401, 402, 1251, 1271, 1272. Louisiana has an "open" primary system. The "primary" election is not a device for party nomination. Rather, there is only a single primary election for each office or group of offices, all qualified voters are entitled to vote in it regrdless of their party affiliations, and all qualified candidates are eligible to appear on the ballot,

regardless of party endorsement or affiliation. § 401. Apart from general requirements such as age or residence, a candidate qualifies to appear on the primary ballot merely by timely filing a "notice of his candidacy" accompanied by either a filing fee or a nominating petition.[4] Filing fees range from five hundred dollars for candidates for governor,

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[4]Section 461 of the Louisiana Election Code provides:

"A person who desires to become a candidate in a primary election shall qualify as a candidate by timely filing notice of his candidacy, which shall be accompanied either by a nominating petition or by the qualifying fee and any additional fee imposed. A candidate whose notice of candidacy is accompanied by a nominating petition shall not be required to pay any qualifying fee or any additional fee." Section 463 A provides in part as follows:

"A (1) A notice of candidacy shall be in writing and shall state the candidate's name; the office he seeks; the address of his domicile; the parish, ward, and precinct where he is registered to vote, and the political party, if any, with which he is registered as being affiliated. The candidate shall designate in the notice the form in which his name shall be printed on the ballot... But he shall not designate a deceptive name.... (Emphasis added.)

"(2) The notice of candidacy also shall include a certificate, signed by the candidate, certifying that he has read the notice of his candidacy ... and that all of the statements contained in it are true and correct...."

three and four hundred dollars for other state offices, and lesser amounts for local and municipal offices. § 464.[5] Nominating petitions are to be signed by registered voters in a certain minimum number, ranging from five thousand for all statewide candidates to lesser numbers for other offices. § 465 C.[6] The

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[5]Dart qualified by paying the applicable $250 fee. See § 464 B(3). Provision is also made for "additional fees," not exceeding one half the amount of the regular filing fee, to be levied, by and for the benefit of the political party desiring to do so, on candidates "affiliated" with that party. § 464 C. Neither the regular filing fee, nor the "additional" fee, is in any way at issue here.

[6]In Dart's case the number would have been one thousand, the figure applicable to municipal candidates in cities with 300,000 or more residents. § 465 C(4) (fewer signatures are required in less populous cities). Other specified offices and their applicable signature requirements include: Congressman and State Supreme Court Justices, 1,000; Court of Appeal Justices, any officers elected throughout a judicial district, and State Senators, 500; State Representatives and any officers elected throughout a parish, 400; any officer elected throughout a ward, 100. § 465 C(3). Offices not provided require one half of one percent of the number of registered voters in the area from which elected. § 465 C(5). No filing fee or additional filing fee is applicable to candidates qualifying by nominating petition. § 461.

Signatures for nominating petitions for primary elections must be gathered in the 120-day period next preceding the opening of the qualifying period for the

registered party affiliation, if any, of the voters signing the petition is irrevelant.[7]

A candidate receiving a majority of the votes cast for the office at the primary election is elected. § 511 A.[8] If no one candidate receives a majority, then the two candidates for the office who received the greatest number of votes at the primary election appear on the subsequent general

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candidates. § 465 B. The qualifying period lasts approximately a week, and, depending on the character of the election, closes (or at least did so during the years 1978 through 1982) as little as six or seven weeks, or as much as twelve or thirteen weeks, before the election day. §§ 402, 467, 468. For the February 6, 1982 New Orleans City Council election the candidate qualifying period closed December 18, 1981. §§ 402 D, 467(4), 468.

The nominating petition requirements are not at issue here.

[7]Although the nominating petition must state, as to the would-be candidate, "the political party with which he is affiliated, if any," no such information is required as to those signing the petition. § 465 D.

[8]Special provision is made for calculation of "majority" when the election is to fill "two or more offices of the same character." § 511 A. And, if at the end of the primary qualifying period no more candidates for an office have qualified than the number of persons to be elected thereto, those so qualifying are declared elected and do not appear on the primary ballot. §511 B.

election ballot, and the candidate who receives the greatest number of votes in the general election is elected. A general election is held for an office only if no one is elected to it as a result of the primary election process, and the only candidates appearing on the general election ballot are those who "survived" the primary. §§481, 482, 551 C(2). The "general" election is thus simply a "runoff" election between those receiving the greatest number of votes in a primary election in which no candidate received a majority. On both the primary and general election ballots all candidates for a given office are listed alphabetically by surname in a vertical column headed by the title of the office. § 551 C.[9] Except for the referenced designation of the registered political party affiliation of candidates

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[9]As a consequence, Dart's name appeared first on the primary ballot's listing of the five candidates for the office of Councilman, District B, City of New Orleans.

registered as affiliated with a recognized party, "no information, designation or title shall be printed on the ballot." § 551 E.[10]

Section 441 of the Louisiana Election Code prescribes the requisites for recognition of a political party:

> "A political party shall be recognized in this state if one of its candidates for presidential elector received at least five percent of the votes cast in this state for presidential electors in the last presidential election, or if at least five percent of the registered voters in the state are registered as being affiliated with the political party...."[11]

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[10]A minor exception is made respecting candidates having the same surname, in which instance the incumbent, if any, is designated as such, and if there is no incumbent, the address of each is given. § 551 C(1).

[11]Section 441 concludes by stating:
"A party which receives more than five percent but less than ten percent of the votes cast n the last presidential election shall not be entitled to representation on a parish board of election supervisors."
This provision is not in issue here.

Under Louisiana law there are thus two routes by which a political party may become recognized. Recognition may be achieved under either. One route is for five percent of the State's registered voters to be registered as being affiliated with that party. When a person registers to vote, his or her then declared "political party affiliation," if any, is entered in the voter registration records. §§ 104 A(11), 107 A. Registration to vote occurs at the local parish level and may be accomplished at any time,[12] though it must normally be done in person. §§ 103, 131, 132, 133. "An elector may change his party affiliation by making application therefor in writing to the registrar." § 107 B. It appears this may be done at any time. Voters "may vote on candidates for public office in primary and general elections without regard

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[12]However, only those who have "registered to vote" thirty days or more before an election may vote in it. §§ 521 A, 135 A.

to the voter's party affiliation or lack of it, and all candidates for public office who qualify for a primary or general election may be voted on without regard to the candidate's party affiliation or lack of it." §401 B.[13] Just when a party must have five percent of the registered voters registered as affiliated with it, in order to be a "recognized" party for purposes of a given election, is not explicitly stated in the statutes. Presumably this status could be achieved as late as the close of the period for candidates to qualify for the election in question. See note 6, supra.[14]

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[13]However, "candidates for membership on a political party commitee may only be voted on by voters who are registered as being affiliated with the same political party as the candidates," and a designation or change of the voter's party affiliation is not effective for such purpose until thirty days after being made. § 521 B. Further, in political party presidential preference primaries (held in April of each presidential year by parties with 40,000 or more registered voters, principally to bind their national convention delegates on the first presidential nomination ballot, §§ 1280.21, 1280.27), "no elector may vote ... for a candidate or slate affiliated with a party in which the elector is not registered." § 1280.25.

The other route provided by Louisiana law for political party recognition is that if one of the party's candidates for presidential elector received at least five percent of the votes cast in the State for presidential electors at the last presidential election, the party is "recognized." The candidates for presidential elector selected by each recognized political party, and the candidates for president and vice president of such party, are certified by the party to the Louisiana Secretary of State and are automatically placed on the ballot. §1253. Otherwise, slates of candidates for presidential elector may be placed on the ballot either by a five hundred dollar filing fee, or by a nominating petition signed by five thousand qualified voters,[15] paid to or filed with the Secretary

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[14]Ballots for primary elections are to be distributed by the Secretary of State twenty-two days before the election. § 552 A.

No complaint has been made respecting the time at which the five percent of registered voters alternative test is to be met.

of State during the period from the first Tuesday in August to the first Tuesday in September of the presidential election year. See §§ 1254 and 465 C(1). See also Blanchard v. Brown, 388 So.2d 865 (La. App. 1st Cir.), writ denied, 386 So.2d 919 (La. 1980).[16] Apparently, a voter is not disqualified from signing a nominating petition for presidential electors by reason of being registered as affiliated with a different political party.[17] Nominating petitions state the names of the electors, of the candidates for

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[15]Five thousand voters would be approximately one quarter of one percent of the 1,942,941 voters who were registered in Louisiana in 1981.

[16]The filing fee method was apparently that by which the Libertarian Party candidates for president and vice president, and elector, got on the ballot in 1980. See Blanchard v. Brown, supra.

[17]It is unclear whether the 120-day period for collecting signatures applicable to primary election nominating petitions, see note 6, supra, is also applicable to nominating petitions for presidential electors. In any event, no complaint is made that it is overly difficult for a "minor" party to get its presidential and vice presidential and elector candidates on the ballot.

president and vice president whom they support, and, in three words or less, the political principle represented. 1254(C). The presidential ballot lists the names of the candidates for president and vice president and, in smaller type, the names of the elector candidates, identified as such. 1259 B. Next to the names of the presidential and vice presidential candidates appear the name and emblem of their political parties, if "recognized", or, "if nominated by a nominating petition, the political principal [sic] which the candidates support, as stated on the nominating petition, if any, and the words 'Nominating Petition'...." Id. The presidential candidates of recognized parties are listed on the ballot alphabetically, "according to the names of the parties, followed by the names of the candidates nominated by nominating petitions, listed alphabetically by designation of political principal [sic]." Id.[18]

The testimony and exhibits at trial revealed that the Libertarian Party had not met either of the requisites for recognition. In 1980, the Libertarian Party had run Ed Clark for President of the United States, and he and his vice presidential candidate and supporting electors appeared on the ballot in Louisiana. See note 18, supra. Had Clark received five percent of the Louisiana presidential vote, the Libertarian Party would

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[18]It is unclear whether the statement of political principle is listed on the presidential ballot in the instance of candidates not of a recognized party who appear on the ballot by paying a filing fee, rather than by filing a nomination petition.

There is no direct evidence of the format of the 1980 presidential ballot. However, a copy of the Secretary of State's 1980 presidential election proclamation is in evidence; and, if its format is similar to that of the ballot, it suggests that each of the seven presidential (and vice presidential) candidates was listed under his "party" name, the "Democratic Party" being listed in the far left-hand column, the "Republican Party" next, and then, continuing in order to the right: "American Independent Party"; "Citizens Party"; "Independent"; "Libertarian"; and "Socialist Workers Party." Appellants have made no complaint, here or below, as to the method of the Libertarian Party's listing on the 1980 presidential ballot, or the format of that ballot, or the requirements for appearing thereon.

have become recognized. According to the 1980 election figures, however, out of 1,548,591 votes cast, Ed Clark received 8,240 votes, or approximately .53 percent of the vote, 4.47 percentage points short of the votes needed for party recognition.[19] Only in one of Louisiana's sixty-four parishes did Clark receive as much as one percent of the total presidential vote, and in that parish (Lafourche) his 326 votes were less than one and one-tenth percent of the total. Only in one parish, Orleans, did he receive as many as 1,000 votes, and there his 1,015 votes were less than six-tenths of one percent of the

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[19]In the 1980 election Ronald Reagan, the Republican candidate, received 792,853 votes, or approximately 51.2 percent of the votes. Jimmy Carter, the Democratic candidate, received 708,453 votes, or approximately 45.7 percent of the votes. John R. Barick, presidential candidate for the American Independent Party, received 10,333 votes, or approximately .67 percent of the votes. Barry Commoner of the Citizen's Party received 1,584 votes, or .1 percent of the total votes cast. Running as an independent, John B. Anderson received 26,345 votes, or approximately 1.7 percent of the votes. And Louisiana voters cast 783 votes, or .05 percent of the votes, for Clifton DeBerry, of the Socialist Workers Party.

parish total. The record also reveals that at the time of trial, the roster of the Libertarian Party of Louisiana contained "at a maximum" only 600 names--names of "simply people who are known to us as being interested in the philosophy of the party" and who were "not necessarily registered as Libertarians."[20] In 1981, Louisiana had 1,942,941 registered voters, five percent of which is 97,147 voters. While there was no evidence of the exact amount of Libertarian registration either statewide or in any one parish, it is evident that the Party was not only vastly short of the five percent statewide total, but was also most significantly below that percentage in every parish. Indeed, the Libertarian Party did not claim to have even as much as one percent of the voter registration in any parish.[21]

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[20]The witness so testifying, called by the Libertarian Party and a member of its Louisiana State Central Committee, also stated that according to his information "there are approximately 600 Libertarians" in Louisiana.

The Libertarian Party and Dart admit that

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[21]The statewide September 1981 voter registration statistics, broken down by parishes, which the Libertarian party procured from the Secretary of State's office and offered in evidence, showed total registration, divided into Democrats, Republicans, and "other," the latter category including all who registered as affiliated with any party other than Democratic or Republican as well as those who declared no party affiliation. Testimony showed that the local voting registrars kept totals on all the other declared party registrations separately by party, and that the Secretary of State was able to procure this information from the local voting registrars on request, but that the information was not routinely furnished to the Secretary of State. The Director of Voter Registration in the Secretary of State's office testified that he had made a spot check of parishes having in total approximately 600,000 registered voters, and that these had less than one half of one percent registered Libertarians (his testimony is somewhat unclear in that he also stated the total number of Libertarian registrants found in these parishes was, so far as he could remember, "about 80"; 80 would be about thirteen one thousandths of one percent, .00013 expressed as a fraction, of 600,000). Appellants admitted on oral argument that the Libertarian Party's statewide registration did not exceed 600. This would be three one hundredths of one percent, or .0003 expressed as a fraction, of the 1,942,941 total registration.

The statewide "other" registered voter category, reflected by the above-referenced statistics, amounted to 6.07 percent (.0607) of the total registered voters; in only one of Louisiana's sixty-four parishes was it as much as 10 percent (in St. Tammany Parish the 5,778 "other " registrants amounted to 10.7 percent of the total); in forty of the parishes it was less than five percent of the total; Orleans Parish, which had the highest total registraton (237,499) likewise had the highest number in the "other" category (16,047, or 6.8 percent).

the Party is not "recognized" under the Louisiana Election Code. They contend, however, that §§ 441 and 551 D and E violate their equal protection rights. In this regard, they challenge as impermissible the distinction Louisiana has made between recognized and nonrecognized parties by requiring the Secretary of State to place on the ballot the registered party affiliation of candidates of recognized political parties, while forbidding placement on the ballot of the party affiliation of all other candidates, including those registered as members of nonrecognized parties. This distinction respecting whether a candidate's party affiliation is listed on the ballot is the only consequence of a party's not being "recognized" of which appellants make any complaint.[22]

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[22]Appellants also argue, as they did below, that the State has made it impossible for the Libertarian Party to achieve five percent voter registration because the registrars refuse the requests of Libertarian voter registrants to indicate their party affiliation on the registration records. The only evidence offered in

THE STANDARD OF REVIEW

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support of this claim was the testimony of the witness Brisbin who stated that this had once happened to him when he registered to vote, at an unspecified time, in Jefferson Parish. There is no evidence that this incident was ever reported to anyone. This witness also testified that "other members of the Libertarian Party ... had the same experience," but he did not say how many were involved or when or where the incidents occurred or whether they were ever reported; he then admitted he was not present at any such incident involving any other voter registrant, and was only repeating what he had been told, and the district court thereupon properly ruled this aspect of Brisbin's testimony was inadmissible hearsay. The State Director of Voter Registration, Bruder, testified he never heard of any such incident as related by Brisbin, that voters were not barred nor in any way restricted from registering as affiliated with the Libertarian Party and that he knew of no activities by election officials which could impede State recognition of the Libertarian Party. It is evident from the district court's opinion that it credited Bruder's testimony, and its decision to do so is not clearly erroneous. Fed.R.Civ.P. 52(a). Moreover, Brisbin's single claimed experience in Jefferson Parish, occurring at some unspecified time and not shown to have been reported to anyone, is obviously an insufficient basis on which to strike down the Louisiana statutory scheme for recognition of political parties, assuming that scheme is otherwise valid. Nor does such an incident serve as a basis for setting aside the 1982 New Orleans City Council election. Moreover, appellants did not request any character of injunctive (or other) relief against any Jefferson Parish officials to require them to comply with the Louisiana Election Code, under the terms of which any eligible voters desiring to do so are clearly entitled to be registered as affiliated with the Libertarian Party.

The primary error which appellants contend that the district court made was in failing to apply a strict scrutiny test to evaluate the validity of the complained of Louisiana Election Code provisions. The strict scrutiny test requires that the challenged statute be narrowly drawn to provide the least restrictive means of furthering a compelling state interest. We have described it as "'strict' in theory and usually 'fatal' in fact." Arceneaux v. Treen, 671 F.2d 128, 131 (5th Cir.1982). The application of the test "has been reserved for matters involving race, religion, national origin and characterizations impinging upon 'fundamental rights.'" Seoane v. Ortho Pharmaceuticals, Inc., 660 F.2d 146, 149 (5th Cir.1981) (footnotes omitted) (quoted in Arceneaux, 671 F.2d at 131). Dart and the Party urge that the distinction the State has made in allowing only the party affiliations of candidates who are members of recognized parties to be placed on

the ballot impermissibly burdens First Amendment rights that the Supreme Court has characterized as fundamental--the right to vote and the freedom of association.

In support of their position that any evaluation of the statutes before the Court calls for the application of strict scrutiny, the appellants cite several Supreme Court decisions concerning election and ballot restrictions, beginning with Williams v. Rhodes, 393 U.S. 23, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968), and concluding with Anderson v. Celebrezze, -- U.S. --, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983). See also Clementson Fashing, --- U.S. ---, 102 S.Ct. 2836, 73 L.Ed.2d 508 (1982); Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. 173, 99 S.Ct. 983, 59 L.Ed.2d 230 (1979); Lubin v. Panish, 415 U.S. 709, 94 S.Ct. 1315, 39 L.Ed.2d 702 (1974); Storer v. Brown, 415 U.S. 724, 94 S.Ct. 1274, 39 L.Ed.2d 714 (1974); American Party v. White, 415 U.S. 767, 94 S.Ct. 1296, 39 L.Ed.2d

744 (1974); Bullock v. Carter, 405 U.S. 134, 92 S.Ct. 849, 31 L.Ed.2d 92 (1972); Jenness v. Fortson, 403 U.S. 431, 91 S.Ct. 1970, 29 L.Ed.2d 554 (1971).

We reject appellants' contentions and hold that the strict scrutiny test is inapplicable. In the first place, a fundamental distinction exists between this case and all the cited Supreme Court decisions. In each of the cases before the Supreme Court the state had prevented the names of the candidates from even appearing on the ballot--candidate ballot access was absolutely denied. In Anderson the Supreme Court identified two "basic constitutional rights," ---U.S. at---, 103 S.Ct. at 1568-69, 75 L.Ed.2d at 556, burdened by ballot restrictions--"[t]he right to vote is 'heavily burdened' if that vote may be cast only for major-party candidates" and "[t]he exclusion of candidates also burdens voters' freedom of association, because an election campaign is an effective platform for

the expression of views ... and a candidate serves as a rallying-oint for like-minded citizens." Id. --- U.S. at --- 103 S.Ct. at 1569, 75 L.Ed.2d at 557 (footnoted omitted). Neither interest is invaded in a case of this kind--the voters had a full choice of candidates, including Dart, and candidate Dart was available as a rallying point and campaign focus for Libertarians and other like-minded citizens.

Dart seems to recognize that the State did not restrict his access to the ballot. Instead, he and the Libertarian Party argue that the Party was denied access to the ballot, and hence application of the strict scrutiny test promulgated in the ballot access cases is mandated here.

We reject this argument. Although the Supreme Court's ballot access cases have discussed, in part, the access of new political parties to the ballot, the restrictions under consideration described as denying access to

the parties have always concurrently denied access to the parties' candidates.

The candidate is a vehicle for a party. He or she represents the ideals of a group of persons and is, once elected, the person whom members of the group expect to implement their political ideals and work toward their political goals. If it had no candidate to offer, a political party would neither seek nor gain access to the ballot. The Libertarian Party here offered its candidate, Henry Dart, whom it supported for City Council. Although the words "Libertarian Party" did not appear under Dart's name, the Libertarian Party was not denied access to the ballot. The ballot's only significance was in electing candidates. It was a candidate, not a party, ballot. Any ballot slot to which the Libertarian Party might have been entitled would have been granted to it through its candidate, Dart. As Dart was granted access to the ballot, so was the Libertarian Party.

When a new party and its candidate are denied access to the ballot, the party members are denied the right to cast their votes for the candidate whom they support. Because Dart was on the ballot, his supporters could vote for him. Their fundamental right to cast their votes effectively was not impaired. Similarly, Libertarian Party members and Dart's other supporters retained their freedom to associate for the advancement of their political beliefs, with candidate Dart, and his campaign, available as a rallying point.

A major goal of a political party is to elect a candidate who will further the party's values and fortunes in the political arena. When a party's candidate is on the ballot, the party members' acts of associating and campaigning for a candidate who will advance their political beliefs are worthwhile. The candidate's placement on the ballot is a requisite for the party members to achieve their goal of having their political thoughts

implemented. If elected, the candidate, as a participant in government, will be able to translate the party members' political beliefs into political action. If the party has no candidate on the ballot, the members' acts of political association can be individually enriching, but cannot directly serve the tangible end of securing a representative voice in government.

Since Dart was on the ballot, any political associating which Libertarian Party members and Dart's supporters did was directly related to furthering a fundamental party and political purpose--to get their candidate, Dart, elected. The members were "wholly free to associate, to proselytize, to speak, to write, and to organize campaigns" in support of their candidate and their political views. Jenness, 403 U.S. at 438, 91 S.Ct. at 1974. The claim that the freedom of association of the Libertarian Party members was significantly burdened cannot be sustained.

We recognize that our rejection of the strict scrutiny test under these circumstances may be ultimately inconsistent with the approach taken by the Eighth Circuit in McLain v. Meier, 637 F.2d 1159 (8th Cir. 1980). There, strict scrutiny was apparently applied to strike down North Dakota laws requiring a petition with signatures of 15,000 registered voters, approximately 3.3 percent of the state total, to be filed ninety days before the primary and 150 days before the general election in order for the candidate of a party which did not receive five percent of the vote at the last gubernatorial general election to be placed on the general election ballot.[23]

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[23]The ultimate result in McLain is not necessarily at varience with that reached here, as the substantive analysis in McLain focusd on the combination of the early petition filing deadline and the "relatively high signature requirement," id. at 1164, and stressed "the importance of the interplay between the statutory signature requirement and the filing deadline..." Id. at 1169. Indeed, the Court noted "that a relatively high signature requirement may be constitutionally acceptable when coupled with an opportunity to approach voters for signatures at a date less remote from the general election...." Id. Here, no timing complaint

In McLain the candidate plaintiff ultimately qualified as an independent, and accordingly in fact appeared on the ballot, but the Court disregarded this circumstance, stating:

> "We decline to find, as the State urges, that the early filing deadline for third party candidates is offset by a later filing deadline for independent candidates. A candidate who wishes to be a party candidate should not be compelled to adopt independent status in order to participate in the electoral process. As the Supreme Court has recognized, 'the political party and the independent candidate approaches to political activity are entirely different and neither is a satisfactory substitute for the other.' Storer v. Brown, supra, 415 U.S. at 745, 94 S.Ct. at 1286." Id. at 1165 (footnote omitted).

However, unlike the California and North Dakota election laws at issue in Storer and

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is made in respect to the five percent of registered voter alternative. In regard to the five percent of votes at the last presidential election alternative, while such a requirement might prove a timing problem in a case like McLain (where the party in question was not formed until the summer of 1978 and the election in question was November 1978), here the Libertarian Party fielded candidates for President and Vice President in November 1980, and no claim is made of any substantial relevant change between that time and the applicable December 1981 qualification period. Further, McLain also found discrimination against minor party candidates in ballot position, id. at 1165-67, which is not present here.

McLain, Louisiana does not provide different methods of ballot access for candidates depending on their party affiliation or independent status, nor do any candidates[24] run as "nominees" of any parties. To secure a place on the ballot, Dart had to do nothing not required of any other candidate, and was certainly not "compelled to adopt independent status."

In Storer, California, replying to the assertion that the ballot access requirements for independent candidates were overly burdensome, contended that an independent candidate could nevertheless secure a place on the ballot by forming a new political party, meeting what were claimed to be the less difficult level of support requirements applicable in such instance, and running as its nominee. It was in rejecting this contention that Storer employed the language relied on my McLain.

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[24]Other than presidential electors, as to whom no complaint is made.

The Storer opinion went on to point out in this connection that not only would the new party route entail "undertaking the serious responsibilities of qualified party status . . . such as the conduct of a primary, holding party conventions, and the promulgation of party platforms," but that it would also in effect require of the candidate, and his supporters, "sacrificing" or "surrendering" their "independent status." 415 U.S. at 745-46, 94 S.Ct. at 1286. The associational rights of the independent candidate and his supporters would be violated by forcing them to form and act as a party, when the very essence of their political philosophy might be antithetical to political parties as such. No comparable situation is present under Louisiana law. Lack of designation of a candidate's party affiliation on the Louisiana ballot does not designate the candidate as an independent or as anything other than a candidate who has not registered his affiliation with a political

party which has either as many as five percent of the State's registered voters or whose presidential candidate received at least five percent of the vote at the last presidential election. Louisiana requires no "flying under false colors."

The McLain Court premised its application of the strict scrutiny test on the fact that the North Dakota statutes at issue restricted the "fundamental right to vote [which] is inseparable from the right to place the candidate of one's choice on the ballot." Id. at 1163. However, as we have observed, the members of the Libertarian Party, and other supporters of Dart, were able to exercise their right to vote for him and he was on the ballot. There was no denial of the right to have the candidate of one's choice on the ballot or to vote for such candidate.

We have observed that the Supreme Court decisions in this general area all deal with situations where the complaining candidates

have been denied access to the ballot, while the case before us does not involve such a denial, and is hence less suitable for application of the strict scrutiny test. However, even in cases where the challenged restrictions prevent the candidate from appearing on the ballot, it is by no means clear that the Supreme Court has uniformly applied a strict scrutiny test.

Where the restrictions burden not only candidate ballot access but also other important constitutionally protected rights, application of the strict scrutiny test seems clearest. This is illustrated by the filing fee cases of Bullock v. Carter, 405 U.S. 134, 144, 92 S.Ct. 849, 856,31 L.Ed.2d 92 (1972) (results of large filing fees "would fall more heavily on the less affluent ... whose favorites may be unable to pay the large costs required ..."), and Lubin v. Panish, 415 U.S. 709, 716, 94 S.Ct. 1315, 1320, 39 L.Ed.2d 702 (1974) (filing fees cannot be a requirement

for indigent candidates; "qualifying candidates ... may not constitutionally be measured solely in dollars"). Another illustration is provided by cases where the ballot access requirements are geographically discriminatory. See, e.g., Moore v. Ogilvie, 394 U.S. 814, 819, 89 S.Ct. 1493, 1496, 23 L.Ed.2d 1 (1969) (invalidating nominating petition requirement which "discriminates against the residents of the most populous counties of the State in favor of rural sections"). Similar considerations seem to have been influential in Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. 173, 99 S.Ct. 983, 59 L.Ed.2d 230 (1979), where the Court was faced with an Illinois requirement that for independent or "new" party candidates to appear on a statewide ballot a nominating petition with 25,000 signatures was necessary, but for such candidates to appear on a municipal ballot the number of signatures required was five percent of the

number voting in the most recent municipal election. The five percent figure produced a total less than 25,000 everywhere except in Chicago and Cook County, where it required some 35,000 signatures. Noting that the state's "interest in avoiding overloaded ballots in statewise elections is served by the 25,000 signature requirement" and that the state "has advanced no reason, much less a compelling one, why the State needs a more stringent requirement for Chicago," id. at 186, 99 S.Ct. at 991, the Court held the election code "unconstitutional insofar as it requires independent candidates and new political parties to obtain more than 25,000 signatures in Chicago." Id. at 187, 99 S.Ct. at 991.

Other ballot access cases are less clear as to the standard applied, especially in regard to the least restrictive means prong of the strict scrutiny test. In Williams v. Rhodes, 393 U.S. 23, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968),

the Court struck down Ohio's complex set of ballot access requirements as applied to presidential elections. These made no provision for independent candidates or write-in votes, required a new party to obtain signatures of fifteen percent of those voting in the preceding gubernatorial election by a very early date, and imposed numerous other burdensome and detailed organizational procedures, including the holding of a primary election conforming to rigorous standards. These requirements were so restrictive that the American Independent Party candidates were unable to qualify despite having garnered signatures (over 450,000) well in excess of the fifteen percent requirement. The Court held that these provisions, "taken as a whole," imposed undue burdens on the fundamental voting and associational rights of individuals not favoring major party candidates and hence were invidiously discriminatory and violative of the equal protection

clause. Id. at 34, 89 S.Ct. at 12. However, doubtless because the combined effect of the Ohio laws was plainly so far in excess of what was necessary or appropriate to further the state's legitimate and compelling interests, the Court's opinion does not clearly indicate that the only valid regulations in this area are those imposing the least restrictive requirements necessary to the satisfaction of such interests.

In Jenness v. Fortson, 403 U.S. 431, 91 S.Ct. 1970, 29 L.Ed.2d 554 (1971), the Court upheld Georgia laws providing that independent candidates, and candidates of political parties whose candidate in the last presidential or gubernatorial election received less than twenty percent of the votes cast, could be placed on the general election ballot only by submitting, by the deadline for candidates to file for the major party primaries, petitions signed during the preceding 180 days by a number of eligible voters not less than

five percent of those who were "eligible to vote in the last election" for the office being sought. Id. at 433, 91 S.Ct. at 1972 (emphasis added). The Court held there was "an important state interest in requiring some preliminary showing of a significant modicum of support" before granting ballot access, "the interest, if no other, in avoiding confusion, deception and even frustration of the democratic process ...." Id. at 442, 91 S.Ct. at 1976. Nothing in Justice Stewart's opinion for the Court, expressing the views of seven Justices (Justices Black and Harlan concurred in the result), suggests application of the strict scrutiny test. It is especially noteworthy that the Court, though plainly aware that the five percent of those eligible to vote requirement was higher than comparable requirements in nearly every other state (id. at 442 & n. 28, 91 S.Ct. at 1976 & n. 28), nevertheless did not appear to consider whether the state's interests might not be adequately served by a lesser percentage.

In American Party of Texas v. White, 415 U.S. 767, 94 S.Ct. 1296, 39 L.Ed.2d 744 (1974), and Storer v. Brown, 415 U.S. 724, 94 S.Ct. 1274, 39 L.Ed.2d 714 (1974), the Court primarily focused on the level of support requirements which minor party or independent candidates had to meet in order to appear on the ballot. In American Party the Texas requirements in this regard were upheld. In Storer the California requirements were held not to be facially invalid, but remand was ordered for factual determination as to whether the brief period (twenty-four days) allowed for signature gathering, coupled with the provision that those who voted in any of the preceding primaries were ineligible to sign the necessary nominating petitions, rendered invalid the requirements that the nominating petitions be signed by five percent of the total votes cast in the last general election, as being more than "a reasonably diligent independent candidate [could] be

expected to satisfy." Id. at 742, 94 S.Ct. at 1285.[25] Although there is some language in these decisions indicating application of the strict scrutiny test, we believe Professor Tribe fairly characterizes these two opinions as a whole in stating that:

> "...each actually assayed the requirements by a far less demanding standard. In particular, the Court in several instances did not inquire whether a less restrictive alternative would adeqately protect the state's interest .... The standard of review actually applied, therefore, seems to have been a mix of strict and minimal scrutiny." L. Tribe, American Constitutional Law (1978), 783.

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[25]While this language might imply that the requirement would be unconstitutional if there were any reasonably diligent candidate who could not meet it, we agree with Professor Tribe that such is an incorrect reading: "The rest of the Storer opinion, however, leaves no doubt that the Court is referring to a reasonably diligent candidate who has a fair amount of popular support." L. Tribe, American Constitutional Law (1978), 783 n. 33. This is further confirmed by the statement in American Party, of which Justice White was also the author, that "...what is demanded may not be so excessive or impractical as to be in reality a mere device to always, or almost always, exclude parties with significant support from the ballot." 415 U.S. at 783, 94 S.Ct. at 1307 (emphasis added).

We also observe that in Storer the Court noted there was "no litmus-paper test" in this area and that "[d]ecision in this context, as in others, is very much a 'matter of degree.'" Id. at 730, 94 S.Ct. at 1279. It seems to us that these remarks are particularly apt as applied to determination of the validity of a requirement for a given level of support. Since Jenness, Storer and American Party, as well as other decisions,[26] clearly establish the constitutionality of conditioning ballot access on a preliminary showing of a substantial modicum of popular support, the validity of such requirements, absent any peculiarly invidious feature, will usually present a "how much" rather than a "whether" question. This sort of question, it seems to us, is particularly ill-suited for mechanical

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[26]See, e.g. Illinois State Board of Elections v. Socialist Workers Party, supra; Jackson v. Ogilvie, 325 F.Supp. 864 (N.D.Ill.), aff'd mem, 403 U.S. 925, 91 S.Ct. 2247, 29 L.Ed.2d 705 (1971); Mandel v. Bradley, 432 U.S. 173, 97 S.Ct. 2238, 53 L.Ed.2d 199 (1977).

application of the strict scrutiny test, especially its least restrictive means prong. If three percent of the registered voters is the challenged standard, the state will be hard put to defend the proposition that the difference between that figure and 2.7 percent is vital to its interest. By the same token, however, it cannot be denied that the interest in assurance of popular support is not "served equally well" (American Party, 415 U.S. at 781, 94 S.Ct. at 1306, emphasis added) by 2.7 percent as by three percent.

In the most recent of the Supreme Court's ballot access decisions, Anderson v. Celebrezze, --- U.S. ---, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983), the Court invalidated, as too early, Ohio's March 20, 1980 filing deadline for independent presidential candidates. The Court was divided five to four, and the majority placed heavy emphasis on the strong national, and diminished state, interest in presidential elections. Id. ---

U.S. at ---, ---, ---, 103 S.Ct. at 1572, 1577, 1579, 75 L.Ed.2d at 561, 567, 569. The opinion contains language suggesting that generally applicable, evenhanded measures restricting ballot access to candidates making a preliminary showing of substantial support are not "constitutionally-suspect." Id. --- U.S. at --- & n. 9, 103 S.Ct. at 1569 & n. 9, 75 L.Ed.2d at 557 & n. 9. This, in turn, appears to militate against application of the strict scrutiny test to measures of that particular variety. Moreover, in articulating overall standards for review of alleged unconstitutionally restrictive election regulations generally, the Court did not expressly invoke the strict scrutiny test. Rather, it directed that there first be considered "the character and magnitude of the asserted injury" to constitutionally protected rights; the next step was to "identify and evaluate the precise interests" of the state asserted as justifications for the burdens imposed by its rule,

determining "the legitimacy and strength of each" such interest and "the extent to which those interests make it necessary to burden the plaintiff's rights." Finally, decision was to be reached "[o]nly after weighing all these factors." Id. --- U.S. at ---, 103 S.Ct. at 1570, 75 L.Ed.2d at 558 (emphasis added). However, the Court noted that "[t]he results of this evaluation will not be automatic; as we have recognized, there is 'no substitute for the hard judgments that must be made.'" Id. (quoting Storer).

We conclude from these decisions that the strict scrutiny test is likely not applicable in determining whether a given level of popular support, required by the state as a condition of candidate ballot access, is too high to meet constitutional standards. We note that the Tenth Circuit appears to have reached essentially the same conclusion in Arutunoff v. Oklahoma State Election Bd., 687 F.2d 1375, 1380 (10th Cir.1982), cert. denied, --- U.S.

--, 103 S.Ct. 1892), 77 L.Ed.2d 282 (1983). or the reasons previously stated, if the trict scrutiny test is likely inapplicable to uch a requirement where it operates to deny a andidate any access to the ballot, then it ould seem evident that it would be inappli- able where the requirement does not deny allot access at all but only designation of andidate party affiliation. See also Mathers . Morris, 515 F.Supp. 931, 935-38 (D.Md.), ff'd, 649 F.2d 280 (4th Cir.) (per curiam), ff'd mem., 454 U.S. 934, 102 S.Ct. 467,70 .Ed.2d 241 (1981).

Concluding that the strict scrutiny test is napplicable, we will attempt to apply the weighing" process suggested in Anderson, ecognizing, with it, that the "evaluation" is ot automatic and that there is no substitute or the hard judgments that must be made. hough we agree that, particularly in this rea, "each case must be resolved on its own acts," Arutunoff, 687 F.2d at 1379, neverthe-

ess, as an inferior court, on "weighing" and evaluation" must necessarily be informed by he substantive results in analogous decisions f the Supreme Court.

PPLICATION OF THE STANDARD

[2] We are first enjoined to consider the character and magnitude" of the asserted njury to appellants' constitutional rights. utting this inquiry in slightly different erms, which we believe have the same substantive meaning but provide a more convenient ramework for our analysis in this particular ase: How high is the hill which appellants re asked to climb, and what sort of asserted njuries to their rights ensue if they are nable to climb it?

We initially consider the sort of injury hich ensues. The rights in question under he First Amendment are to cast a meaningful ote for a candidate of one's choice and to eaningfully associate for the advancement of

olitical beliefs. Anderson, --- U.S. at ---, 03 S.Ct. at 1569, 75 L.Ed.2d at 557. Under he equal protection clause there is also the ight not to be subjected to invidious or rrational discrimination in respect to these nterests. Williams. Here, any injury to any f these rights is minor, indirect and emote. As previously discussed, Libertarians nd other supporters of Dart had full oppor- unity to vote for him, and to have their vote ounted equally, and Dart's candidacy was vailable as a rallying point for like-minded itizens. Further, the ballot's omission of he designation "Libertarian" by Dart's name, hile listing "Democrat" by the name of each f his four opponents, resulted not from any nvidious or irrational discrimination, but ather from neutral criteria of general and venhanded application, criteria which Jenness nd related decisions indisputably establish re rationally and legitimately related to istinctions which the state may make between

litical parties in its "recognition" or eatment of them. See Bullock, 405 U.S. at 7, 92 S.Ct. at 858 ("distinguishing between litical parties on the basis of success in ior elections" is permissible); Anderson, - U.S. at --- n. 9, 103 S.Ct. at 1570 n. 9, L.Ed.2d at 557 n. 9.

Perhaps the inability of a candidate affil-ted with a "minor" party to have the ballot signate his party affiliation, while the spective party affiliations of candidates filiated with "major" parties do appear on e ballot, diminishes the former's chances of ccess in any given election. If this were ue to any really significant extent, the ck of party designation might arguably be id to impair the ability to cast a aningful vote, or to meaningfully associate r the enhancement of political belief. But e truth of such a proposition is by no means lf-evident, and there is no evidence in this cord, and appellants point to no recognized

terature or facts of common knowledge, so emonstrating. The 1980 presidential election esults in Louisiana (see note 19, supra), in hich apparently Anderson ran simply as an ndependent" and the four "minor" and two najor" party candidates ran under their espective party names (see note 18, supra), o not so suggest, as Anderson had the third ighest vote total, with well over twice the ote of the highest "minor" party candidate. t is certainly not obvious that designation f affiliation with a party that has been nable to register as many as five percent of he registered voters will be helpful to a andidate. Moreover, except in presidential lections, the Louisiana ballot designation of candidate's party affiliation does not indiate that the candidate has been selected by r has the support of that party or any of its embers (other than the candidate). Hence, he "undesignated" candidate is not labeled as acking all organizational support or as hav-

less than any other candidate. And the lot is not structured as a race between ties which the "minor" parties are not owed to enter. It is a candidate ballot, only significance of which is the election individual candidates, not party nominees such. Perhaps over a period of time a nor" party would benefit from the posure" attendant to having its name appear the ballot, but this is wholly culative. The effect might be just the posite, as with the perennially losing can- date. The Court observed in Anderson that ery electoral regulation "inevitably fects--at least to some degree--the individ- l's right to vote and his right to associate th others for political ends," but plainly plied that this factor alone did not consti- te a regulation or burden "constitutionally- pect." --- U.S. at ---, 103 S.Ct. at 1569, L.Ed.2d at 557. We conclude that any jury to the Libertarian Party members'

ability to effectively vote and associate for political purposes, arising from the Party's failure to be "recognized" under Louisiana law, is at most indirect, attenuated and slight.

Is the hill appellants have been asked to climb too high? Since, as we have noted, the decisions of the Supreme Court clearly recognize that a state may properly condition party ballot recognition on "some preliminary showing of a significant modicum of support," Jenness 403 U.S. at 442, 91 S.Ct. at 1976, this question becomes essentially one of degree. Louisiana allows "recognition" on the basis of either five percent of the vote cast at the last presidential election or registered affiliation of not less than five percent of total registration. Support at the level of five percent of total registration would not appear to be excessive, as that was the figure sustained in Jenness. No subsequent decision of the Supreme Court has

questioned the soundness of this holding in Jenness and Jenness has been cited with approval in regard to its "some preliminary showing of a significant modicum of support" holding in a host of subsequent Supreme Court ballot access cases. See Bullock, 405 U.S. at 147, 92 S.Ct. at 858; Storer, 415 U.S. at 738, 94 S.Ct. at 1238; American Party, 415 U.S. at 782 n. 14, 789, 94 S.Ct. at 1307 n. 14, 1310; Illinois State Board of Elections, 440 U.S. at 185, 99 S.Ct. at 990; Anderson, --- U.S. at --- n. 9, 103 S.Ct. at 1570 n. 9, 75 L.Ed.2d at 557 n. 9. See also Lubin, 415 U.S. at 718-19, 94 S.Ct. at 1320-21; Clements, --- U.S. at ---, 102 S.Ct. at ---, 73 L.Ed.2d at 517. Indeed, no Supreme Court decision has invalidated a ballot access requirement solely or even primarily on the ground that the required level of support--in terms of number or percentage of the vote or voters--was excessive.[27] Rather, the critical focus seems to have been mainly on the provisions related

o how the required level of support had to be emonstrated, such as the length of time llowed to collect signatures, the time at hich the level of support had to be demon-trated, what citizens could be counted for hat purpose, and the like. See e.g., Moore . Ogilvie, supra; Illinois State Board of lections, supra; Mandel v. Bradley, supra; torer, supra. We recognize there are intima-ions in Storer, 415 U.S. at 739, 94 S.Ct. at 283, that the Jenness level of support re-uirements may approach the maximum ermissible for exclusion of candidates from he ballot. See also L. Tribe, American onstitutional Law (1978), 784 "...requirements as high as five percent are ot unconstitutional per se, but requirements

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[27]We do not regard Williams as being to the ontrary. There, the focus was clearly on the totality f the barriers. Indeed, in Williams the American ndependent Party met the fifteen percent of the vote n the previous election requirement (which would be quivalent to about eight percent of registered voters, f 53 percent of those registered voted).

ubstantially in excess of five percent robably are" (footnote omitted)). But here, he five percentage figure, whether applied to hose voting in the last presidential election r to registered voters, is not greater than hat approved in Jenness (five percent of hose eligible to vote in the last election), nd we hold that, of itself, it is not excesive.[28] We are unable to find Louisiana contitutionally at fault for using five percent, nstead of three percent or one percent, for urposes of its statutory scheme.

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[28]While the evidence shows that only the Democratic nd Republican Parties, and; some years ago, the States ights Party, have met the Louisiana requirements for recognition," there is no showing of the effort in his regard, if any, made by any other party, or that ny "unrecognized" party had ever demonstrated in any manner, whether by the vote received by candidates it upported, its number of registered voters, petitions, laimed membership or otherwise, any significant easure of popular support. See note 25, supra. The ighest "minor" party level support which the record hows is the two thirds of one percent vote received by he American Party in the 1980 presidential election John Anderson, running as an Independent, received 1.7 ercent). See note 19, supra.

Appellants, however, also contend that the ouisiana recognition requirements are overly tringent in respects other than simply re- uiring too high a percentage level of upport.

In this connection, appellants initially ontend that both of the Louisiana recognition lternatives--that based on the previous residential vote and that based on registered oters--are excessive because they are easured against statewide totals although heir application is not confined to statewide lections, but extends to purely local lections as well, such as the municipal lection in which Dart was a candidate. This, f course, was not the situation in Jenness, here the five percent standard was applied gainst the number eligible to vote in the ast election for the particular office in uestion. As an abstract matter, we recognize here is considerable force in this particular ontention of appellants, and much can be said

r the proposition that Louisiana would be
ll advised to allow each of its five percent
andards to be satisfied in the particular
ea where the election as to which a party
sires to be "recognized" is held. Under such
system, if the Libertarian Party had polled
ve percent of the 1980 presidential vote
st in the New Orleans City Council, District
area, or if by December 1981 five percent of
e registered voters in the New Orleans City
uncil, District B area were registered as
bertarians, then Dart would have been
titled to have "Libertarian" placed under
s name on the ballot for the February 1982
w Orleans City Council, District B "primary"
ection. However, we decline todetermine in
is case whether Louisiana is constitu-
onally required to provide such a
ocalized" alternative to its standards for
rty "recognition." The evidence is quite
ear that appellants would not in <u>any</u> parish
me remotely close to meeting even a two

rcent requirement--whether applied to presi-
ntial vote or voter registration--and they
not contend otherwise, or that the
uisiana Libertarian Party would so much as
proach qualification for "recognition," in
w Orleans City Council, District B or any-
ere else, under a "localization" of the
uisiana party recognition standards. Ac-
rdingly, although we do not pass on the
stract merits of appellants' contentions in
is regard we do decline to reverse the judg-
nt of the district court on any such
sis. See Storer, 415 U.S. at 734, 94 S.Ct.
1281 ("... neither Storer nor Frommhagen is
position to complain that the waiting
riod is one year, for each of them was
filiated with a qualified party no more than
x months prior to the primary"); Broadrick
Oklahoma, 413 U.S. 601, 609-16, 93 S.Ct.
08, 2914-18, 37 L.Ed.2d 830 (1973);
utunoff, 687 F.2d at 1380.

The Libertarian Party and Dart also attack the presidential vote alternative of Louisiana's party recognition requirements because it presents an insuperable barrier to any political party, no matter how great its popular support, which is either formed after the most recent presidential election or exists exclusively for the purpose of participating in State politics. However, the Libertarian Party fits neither of these classifications. It was formed well prior to the 1980 election and ran presidential and vice presidential candidates in that election who appeared on the ballot in Louisiana. Appellants do not contend, and none of the evidence suggests, that the Party, its purposes, level of support or relevant circumstances have materially changed since then, or that there is any reason to believe that it is prejudiced by these particular aspects of the presidential vote alternative. It would thus appear that appellants are in no position to complain

of these asserted defects in the presidential vote alternative. Further, in any event the registered voter alternative remains available.

Appellants assert, however, that the registered voter alternative is overly burdensome because it it too difficult to persuade voters to change their registration. They point out that in Jenness the requirement was for petitions, not registration. We are not persuaded. Party affiliation registration or change thereof is not a burdensome procedure under Louisiana law, and it may be accomplished at any time. There are no limits on how frequently one may change registered party affiliation, nor any minimum time which must elapse between changes. Registered party affiliation does not affect the right to vote or run in any election[29] or to sign nominating

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[29]Except that one may not vote or run in an election for party (not governmental) offices or vote in a party's presidential preference primary unless one is registered as affiliated with that party thirty days

etitions for candidates. There is no vidence that procuring the requisite number f party registrants is significantly more ifficult than procuring a like number of ignatures of registered voters on a petition equesting party recognition. We observe that n Jenness all the signatures on the petitions ad to have been executed within the six onths next preceding the candidate filing eadline for the primaries. No such limitaion on the length of time utilized to procure he requisite number of registered party ffiliates exists under Louisiana law.

Appellants rely in this connection on N.C. ocialist Workers Party v. N.C. State Board of lections, 538 F.Supp. 864 (E.D.N.C.1982), here the court held invalid a North Carolina allot petiton provision for minor party andidates requiring the petiton to recite hat those signing thereby directed that they e registered as affiliated with the party in

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efore the election in question. See note 13, supra.

question. The provision concerning registration was relatively new, and unrebutted evidence showed that while the plaintiff Socialist Workers Party had had no difficulty in meeting the petition requirements before the provision concerning its effect on the signer's registered affiliation came into force, thereafter the Party was "completely stymied" because of the resistance on the part of potential signers engendered by the new provision. No remotely comparable evidence exists in this case. Nor are we informed of the effects on a voter which North Carolina law attaches to his or her registered party affiliation.[30] More significantly, under the

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[30]It may be, for example, that in certain areas of North Carolina the Democratic primary was, in practical effect, the election, and that voting in such primary was restricted to those registered as Democrats. Voters who may have desired a minor party candidate to appear on the ballot for a particular statewide office might have been reluctant to sign such a petition out of fear that by doing so they might be effectively prevented from voting in the only "real" election, the Democratic primary, for local offices (though they could change their registration back, this would require extra effort, would appear to render their

North Carolina system, the petitions were a means of ballot access for the candidates. Thus a voter was, in effect, required to join the Socialist Workers Party in order to be given the opportunity to vote for one of its candidates. As the court explained: "The restrictive effect is particularly serious in the case of the unaffiliated voter, one who desires to join no party .... [The provision burdens] the ability to vote effectively of persons who wish to consider the Party's candidates but do not wish to join the Party." N.C. Socialist Workers Party, 538 F.Supp. at 866. In Louisiana there is no such burden, for Louisiana's requirements, unlike those of North Carolina, do not restrict which candidate appears on the ballot, and unlike his North Carolina counterpart the Louisiana voter who is interested in voting for the candidate, but not in joining the party, has full oppor-

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petition signature false and might present timing problems). Nothing comparable exists under the Louisiana system.

unity to so vote, regardless of how many egister as affiliated with the party. In ouisiana, it is only those who want to assure hat the party name, in addition to the de- ired candidate, appears on the ballot, who eed be concerned with whether the party has ufficient registrants. It does not seem nreasonable for Louisiana to provide that uch concern be manifested by registered party ffiliation.

Accordingly, we conclude that, as applied o appellants, the burdens placed upon them to void the asserted injuries to their rights re not excessive or unreasonably difficult, articularly in light of the relatively minor, emote and attenuated nature of the asserted njuries themselves. More simply put, the character and magnitude" of the asserted njury is not severe, quantitatively on quali- atively.

We turn now to consideration of the State's nterest asserted as justification for the

burdens" imposed on appellants. This interest is readily identified, namely the interest n avoiding "confusion" or "deception" in allot content. the legitimacy and strength f this interest has been recognized in umerous decisions of the Supreme Court. enness, 403 U.S. at 442,91 S.Ct. at 1976; ullock, 405 U.S. at 145, 92 S.Ct. at 857 interest in avoiding "voter confusion"); ubin, 415 U.S. at 715, 94 S.Ct. at 1319 (interest in keeping ballots "understandable" is of the highest order"); Storer, 415 U.S. at 32, 94 S.Ct. at 1280 (quoting Jenness). hile the particular ballot confusion or deception addressed in those cases was that hich might arise from an excessive number of andidates appearing on the ballot, it appears bvious that those decisions rest on the roader principle that the state had a strong nd legitimate interest in minimizing ballot-ngendered voter confusion or deception generlly, regardless of what it is about the ballot that causes it to have that potential.

It is evident that if candidate political "party" affiliation is to be designated on the ballot, the potential exists for voter confusion or deception unless there are some restrictions on what constitutes a political "party" for these purposes. A political party implies a relatively numerous group of people, associated together for common political purposes, with some sort of organization actively functioning in the political arena. For the state's ballot to represent that a candidate is affiliated with a particular political party, when in fact there is no such party in the commonly understood sense of the word, has the obvious potential for causing voter deception and confusion. Moreover, the quality and quantity of information actually imparted to voters by the designation of candidate party affiliation will to a significant extent vary with the degree to which the designated party is known to the voters, and a reasonable method by which to gauge such voter knowledge

is the level of support which the party has achieved among the electorate. Indeed, no practical and equally effective alternative gauge suggests itself. Finally, just as an unrestricted proliferation of candidate names on the ballot may engender confusion or deception, so may an unrestricted proliferation of party names. And, requiring some preliminary showing of a significant modicum of support for a party before a candidate's affiliation with it is designated on the ballot is necessary to further the state's strong and legitimate interest in minimizing ballot confusion and deception in the same way as requiring such a showing respecting a candidate, before his name is listed on the ballot, is necessary to further such interests.[31]

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[31]We recognize that on presidential election ballots Louisiana has allowed designation of the party nominating the presidential candidate without requiring any significant showing of support for that party. See notes 15, 16 and 18, supra, and accompanying text. We do not consider that Louisiana is thereby obliged to

Appellants suggest there is no need to have any party designation on the ballot, and that it is unimportant because the ballot's party designation does not imply any endorsement or support by the named party. We reject these contentions. Louisiana allows almost unre-

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apply the same scheme to the rest of its elections. The State may well have chosen the system it did for presidential voting to achieve greater uniformity with other states in such a truly national contest. This is certainly a legitimate consideration. See Anderson, --- U.S. at ---, ---, ----, 103 S.Ct. at 1572, 1577, 1579, 75 L.Ed.2d at 561, 567, 569. Additionally, the party of a presidential nominee might have significant support elsewhere in the nation, though not in Louisiana, the relevance of such out-of-state support for the candidate's party is obviously far greater in presidential than in state elections, and Louisiana voters would be more likely in presidential than in state elections to familiarize themselves with a party having significant support only out of state. The difficulty of measuring such out-of-state support for any given party may have influenced Louisiana in its decision to impose no significant level of support requirements for party name designation on the presidential ballot. Finally, Louisiana's presidential ballot--like that of most other states--is organized by parties. The portion of the ballot applicable to the residential race consists only of party nominees and independents. In that circumstance, Louisiana may reasonably have felt it more appropriate to list the party name, even though the party had not demonstrated significant support, and more prejudicial to the party and candidate to refuse to do so, than in the case of Louisiana's other elections where no candidate appears on the ballot as or by virtue of being a party nominee.

stricted candidate access to the ballot. While this openness subserves the interests which the First Amendment is designed to foster, it likewise, as the previously cited decisions recognize, has more of a tendency to produce voter confusion or deception than does a system which restricts candidates to those who have made some preliminary showing of a significant modicum of support. Some information about candidate affiliation with a party which has demonstrated a significant modicum of support will mitigate this tendency to greater voter confusion or deception which is the inevitable consequence of Louisiana's otherwise First Amendment enhancing "open" ballot. Further, the fact that Louisiana's electoral scheme gives no formal or structural significance to party nomination or endorsement tends to increase, rather than decrease, the need for some ballot information concerning party affiliation. But that party-related ballot information need not be so open ended

or unrestricted as to itself engender confusion or deception.[32] And, nothing in the Constitution forces Louisiana to choose between giving parties no recognition whatsoever or, on the other hand, giving them the major role in the formal electoral process that most other states do. Moreover, the less "importance"which is assigned to the ballot designation of candidate party affiliation, the less "prejudice" to appellants on account of the Libertarian Party not meeting the support qualifications required to be listed on the ballot as the "Party" with which a candidate is affiliated.

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[32]Appellants also suggest that a designation of political beliefs would serve any needed informational function as well as party affiliation, while avoiding any necessity to provide standards to party "recognition." We disagree. Ballot space and the time for a voter to consider what he or she sees on the ballot are necessarily severly limited. The simple reference to an existing political party which actually has significant public support carries far greater potential for imparting much more, and more accurate and relevant, information than does the potentially infinite variety of self-serving descriptions of political beliefs by which candidates might choose to describe themselves.

Weighing and evaluating the character and magnitude of the asserted injury to those interests of appellants which the First Amendment is designed to foster, the strength and legitimacy of Louisiana's interest asserted in justification of the burdens imposed and the extent to which those interests necessitate such impositions, we conclude that the Louisiana statutes in question do not violate appellants' constitutional rights under either the First Amendment or the equal protection clause. Louisiana's standards for party recognition are high, indeed close to, or perhaps even marginally beyond, those which might be judged permissible were the consequences of failing to meet them significantly more severe, such as denial of candidate ballot access. But the consequences are not severe, and appellants' ability to exercise and enjoy their rights under the First Amendment are neither clearly, directly, nor significantly impaired. Though Louisiana

treats the Libertarian Party differently from some other parties, it does so solely on the basis *of neutral, evenhanded criteria of* general applicability. It is not required to treat "things that are different as though they were exactly alike." Jenness, 403 U.S. at 442, 91 S.Ct. at 1976; Anderson, --- U.S. at ---, 103 S.Ct. at 1576, 75 L.Ed.2d at 565. These criteria and the treatment resulting from their application are reasonably calculated and important to the furtherance of strong and legitimate interests of the State. We do not suggest that Louisiana's electoral system would inevitably collapse in near total confusion and deception if its ballot did not designate any candidate's party affiliation, or if its requirements for ballot designation of candidate party affiliation were sufficiently lowered so that the Libertarian Party would qualify. However, we fail to perceive any significant injury to, or invidious treatment of, appellants under the

Louisiana system. Louisiana has acted fairly to materially further, though perhaps not to a great degree, its strong and legitimate interests in reducing the potential for voter confusion and deception which its ballot might otherwise tend to engender. As applied to appellants, we find the Louisiana provisions in question to be constitutional. The judgment of the trial court is therefore affirmed.

AFFIRMED.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION NO. 82-96 SECTION "C"

HENRY T. DART and the
LIBERTARIAN PARTY OF LOUISIANA

VERSUS

JAMES H. BROWN, Secretary of State for the State of Louisiana, and EDWIN A. LOMBARD, Clerk of the Criminal District Court for the Parish of Orleans, State of Louisiana

* * * * * * * * * * * * *

MEMORANDUM OPINION

Plaintiff, Henry T. Dart, is a duly qualified candidate in the February 6, 1982 election for the District B seat of the New Orleans City Council and is a member of the Libertarian Party of Louisiana , also a plaintiff in this action. The plaintiffs allege that LSA-R.S. 18:441, 551(D), 551(E) violate the First and Fourteenth Amendments to the United States Constitution, and the Louisiana Constitution Article 1 3 (1974). In particular, plaintiffs allege that these state laws afford a different and impermis-

sibly discriminatory access to the election ballot for so-called recognized parties, depriving the plaintiffs' constitutional rights to equal protection of the law. The defendants in this matter are James H. Brown, Secretary of State for the State of Louisiana, and Edwin A Lombard, Clerk of the Criminal District Court for the Parish of Orleans, State of Louisiana. Jurisdiction is invoked pursuant to 28 U.S.C. 1343.

The facts in this case can be simply stated and have been largely stipulated by the parties.

On December 18, 1981, Dart qualified as a candidate for Councilman for District B of the City of New Orleans. The election is scheduled for February 6, 1982. In his Notice of Candidacy filed with the Clerk of the Criminal District Court for the Parish of Orleans, Dart checked the box indicating that he was not affiliated with a recognized party and then typed in "Libertarian Party" next to that

box. On December 21, 1982, the Clerk of Criminal District Court, Edwin A. Lombard, certified to the Secretary of State, James H. Brown, the candidates qualified for the election. The certification lists the political affiliation of all candidates as Democrats, except Dart, who is listed as having no party affiliation. On January 4, 1982, Dart wrote to Brown and Lombard and demanded that "Libertarian Party" be placed after his name on the ballot. Melvin L. Belar, Legal Counsel of the Secretary of State, responded by letter dated January 7, 1982, stating that the Secretary of State lacked authority to place Dart's party affiliation on the ballot because his was not a recognizd party. In its present form, the ballot indicates the party affiliation of all candidates for District B Councilman as Democrats, except Dart, who is listed without party affiliation. Dart and the Libertarian Party of Louisiana filed this lawsuit on January 11, 1982, seeking to have

the Libertarian Party placed along with Dart's name on the ballot for the February 6, 1982 election or, alternatively, enjoining defendants from placing the party affiliation of any candidate on the ballot for the February 6, 1982 election. Plaintiffs then moved for a temporary restraining order and preliminary injunction. A hearing on the preliminary injunction was held on January 29, 1982 at 9:00 a.m., and the Court, pursuant to stipulation by all parties, ORDERED the trial on the merits consolidated with the hearing on the application for a preliminary injunction. Fed.R.Civ.P. 65(a).

DISCUSSION

Under the Louisiana Election Code, only a "recognized party" can be listed on an election ballot.

> Political party designation. The political party designation of a candidate who is registered as being affiliated with a recognized political party shall be printed on the primary or general election ballot on the same line

> and immediately after or below the candidate's name. If a candidate is not affiliated with a political party, the space after his name shall be left blank.

LSA-R.S. 18:551(D).[1] A party is recognized "if one of its candidates for presidential elector received at least five percent of the votes cast in this state for presidential electors in the last presidential election, or if at least five percent of the registered voters in the state are registered as being affiliated with the political party." LSA-R.S. 18:441. At the present time, only the Democratic Party and the Republican Party are recognized in Louisiana.

Initially, the plaintiffs seek to have this Court apply "strict scrutiny" in reviewing these state election laws on the grounds that the said statutes impinge upon the plaintiffs'

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[1]This particular statute is inapplicable to national elections for president and vice president, where a candidate's party affiliation may be designated on the ballot regardless of whether a candidate is nominated by a recognized party or by nominating petition. LSA-R.S. 18:1259.

onstitutional right to vote and first amend-
ent right to freedom of speech. No authority
as been cited by the plaintiffs which would
arrant the application of strict scrutiny
nder the present circumstances. Where state
aw limits initial access to the ballot, the
loctrine of strict scrutiny has been invoked
ecause in that situation only a compelling
tate interest can justify such a direct
urden upon the right to vote. See Lubin v.
Parrish, 415 U.S. 709 (1974); Bullock v.
Carter, 405 U.S. 134 (1972). The right to
vote, or access to the ballot as a candidate,
is not an issue in the present case. Dart is
admittedly a qualified candidate in the
election for Councilman from District B, and
his name is on the ballot. The only question
to be resolved by this Court is whether Dart's
political affiliation should be designated on
the ballot in the same fashion as candidates
of recognized political parties. This contro-
versy raises only vague allegations of uncon-

stitutional treatment, requiring something less than strict scrutiny. As the Court stated in Clough v. Guzzi, 416 F.Supp. 1057, 1067 (D. Mass. 1976):

> Voters have no constitutional right to a wholly rational election, based solely on reasoned consideration of the issues and the candidates' positions, and free from other 'irrational' considerations . . .. We conclude that, even assuming some positional advantage here, the voters' right to choose their representatives is not sufficiently infringed as to warrant strict scrutiny . . ..

Instead, this Court, in accordance with the methodology employed in Krasnoff v. Hardy, 436 F.Supp. 304, 308 (E.D. La. 1977), will review the merits of the plaintiffs' cause of action and determine whether Louisiana has a legitimate, rational reason for distinguishing between major parties and non-recognized parties.[2]

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[2]Plaintiffs also allege a claim under the equal protection guarantee of the state constitution. La. Const. Art. 1 3. This clause, however, is merely a restatement of the equal protection clause of the United States Constitution. Therefore, the Court's

Plaintiffs have cited no authority requiring a state to designate the political persuasion of an independent candidate. In fact, the jurisprudence is firmly against the plaintiffs. In Jenness v. Fortson, 403 U.S. 431 (1971), the Supreme Court held that a Georgia election law, which required the nominee of an independent political body to file a nominating petition signed by not less than five percent of the eligible voters before the candidate and his party could appear on the ballot, does not abridge constitutional rights of free speech and association, and did not violate the equal protection clause. The Supreme Court concluded, as does this Court, that the state has a valid, rational basis for drawing a distinction between candidates from a major party and candidates nominated by smaller, independent parties.

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analysis of the federally protected claims is equally applicable to the cause of action alleged under the state constitution. Burmaster v. Gravity Drainage District No. 2 of the Parish of St. Charles, 366 So.2d 1381 (La. 1978).

> The fact is that there are obvious differences in kind between the needs and potentials of a political party with historically established broad support, on the one hand, and a new or small political organization on the other. Georgia has not been guilty of invidious discrimination in recognizing these differences and providing different routes to the printed ballot. Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike, a truism well illustrated in Williams v. Rhodes, supra.
>
> There is surely an important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate on the ballot--the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election.

Id. at 441-42. Similarly, the same state interests in avoiding confusion, deception, and frustration, are served by requiring political parties to attain some significant modicum of support before the party's candidate can be identified as such in elections other than the presidential election. Krasnoff v. Hardy, supra at 310; Mathers v. Morris, 515 F.Supp. 931, 936 (D. Md.), aff'd, 649 F.2d 280 (5th Cir.1981).

Louisiana presently operates under an open primary election system. Any person who desires to become a candidate in a primary election may qualify as a candidate by timely filing a Notice of Candidacy, accompanied either by a nominating petition or by the qualifying fee and any additional fee imposed. LSA-R.S. 18:461.[3] If each candidate were allowed to have his party affiliation listed on the ballot, this would only compound the pandemonium associated with open primaries. Indeed, some candidates may be endorsed by multiple political parties and the very notion of a political party becomes indefinite without some minimal voter requirement. Where would the state draw a line?

Plaintiffs have suggested that the most rational solution is to eliminate the party affiliation of all candidates from the

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[3]Dart orally represented to the Court that he qualified as a candidate for District B Councilman by filing his Notice of Candidacy and paying a fee of $250.00.

ballot. The Court, however, has already ruled that the public has no constitutional right to a wholly rational election. It is the role of the legislature to weigh and balance the policy consideration of a particular enactment. Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976). The Court's task in this case is to simply determine whether the law has a rational basis. The Court has found a legitimate rational reason for distinguishing between recognized parties and non-recognized parties, and the mere fact that plaintiffs propose an allegedly more rational election ballot does not in any manner deter the constitutionality of the state statutes. See Anderson v. Winter, 631 F.2d 1238, 1240-41 (5th Cir.1980).

Moreover, it may be in the best public interest to allow candidates affiliated with recognized parties to designate their party status on the ballot because at the very least, voters will be able to determine which

candidates have aligned themselves with the major political parties. Consequently, the law brings a measure of order to the election ballot by permitting some information concerning a candidate's political background without going to the extreme of permitting every candidate to designate any "party" real or imagined, serious or otherwise, which might ultimately end up confusing the public.

The evidence at trial clearly demonstrates that the law does not place any undue burden upon minor political parties. Wade Brisbin, a member of the State Central Committee for the Libertarian Party, testified that the Libertarian Party was actively seeking to attain the status of a recognized political party, especially during presidential campaigns. In the 1980 presidential election, the Libertarian Party was designated on the ballot along with its nominee, Ed Clark. Since a party can become recognized if it obtains at least five percent of the state

vote in a presidential election, every vote cast for the presidential electors of the Libertarian Party counts both toward the election of its candidate and toward meeting the requirements of a recognized party. In effect, members of the Libertarian Party, or other independent parties, have an added incentive to vote for the nominee of their party, because while an outright victory for the party candidate may be unthinkable, achieving the status of a recognized party is a more reasonable goal and provides the first step toward the long term success of the party. Brisbin stated that the Libertarian Party encountered no impediment in its effort to obtain recognition during the last presidential campaign.[4] According to the testimony of Louis Bruder, Director of Registration,

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[4]In the 1980 presidential election, the record indicates that the Libertarian Party received only 8,240 votes out of 1,548,591 total votes cast in the State of Louisiana, much less than one percent of the total state vote (Exhibit D-1).

voters were not barred nor in any way restricted from registering as affiliated with the Libertarian Party, and he knew of no activities by election officials which could impede state recognition of the Libertarian Party. In short, Louisiana law does not insulate the major parties from competition by newer or smaller parties. Instead, the law provides an orderly avenue for upstart parties to achieve state recognition.

CONCLUSION

Based upon the foregoing authority, the Court finds that the Louisiana statutes which allow recognized parties access to the ballot do not violate the plaintiffs' constitutionally protected rights. The Court is also convinced that denying plaintiffs relief will not substantially impair Dart's chances at the election, and therefore, plaintiffs have failed to demonstrate the threat of irreparable harm in this case. By contrast, the

ate of Louisiana, and ultimately the voting blic, would be seriously affected by a sud- n disruption of this election. Krasnoff v. rdy, supra at 310. Accordingly, plaintiffs' tion for preliminary injunction is DENIED, d Judgment shall be entered in favor of the fendants.

New Orleans, Louisiana, this the 3rd day February, 1982.

S/Robert F. Collins
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION NO. 82-96 SECTION "C"

HENRY T. DART and the
LIBERTARIAN PARTY OF LOUISIANA

VERSUS

JAMES H. BROWN, Secretary of State for the State of Louisiana, and EDWIN A. LOMBARD, Clerk of the Criminal District Court for the Parish of Orleans, State of Louisiana

JUDGMENT

This matter was tried before the Court, sitting without a jury, on January 29, 1982. Pursuant to the Opinion of this Court, dated February 3rd, 1982, and in accordance with the provisions of Fed.R.Civ.P. 58:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Judgment shall be entered in favor of the defendants, James H. Brown and Edwin A. Lombard, and against plaintiffs, Henry T. Dart and the Libertarian Party of Louisiana, dismissing this cause of action.

Plaintiffs shall bear the costs of this suit.

New Orleans, Louisiana, this the 3rd day of February, 1982.

S/Robert F. Collins
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
NO. 82-3146

HENRY T. DART and the
LIBERTARIAN PARTY OF LOUISIANA,

Plaintiffs-Appellants,

VERSUS

JAMES H. BROWN, Secretary of State for
the State of Louisiana, ET AL.,

Defendants-Appellees.

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Appeal from the United States District Court
For the Eastern District of Louisiana

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ON PETITION FOR REHEARING

(December 12, 1983)

Before TUTTLE*, POLITZ and GARWOOD, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

S/Will Garwood
United States Circuit Judge

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*Senior Judge of the Eleventh Circuit, sitting by designation.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

NO. C83-0318-B

JAMES E. BLOMQUIST, DAVID A. DAWSON, LARRY E. GRAY, and GERARD B. REITH,

Plaintiffs,

VERSUS

THYRA THOMSON, Secretary of State for the State of Wyoming,

Defendant.

* * * * * * * * * * * * *

ORDER ON MOTIONS FOR SUMMARY JUDGMENT

This matter came on regularly to be heard by the Court upon the cross motions of the parties for summary judgment, James C. Linger, Esq., and Robert E. Skar, Esq., appearing for plaintiffs, and Rowena L. Heckert, Esq., Assistant Wyoming Attorney General, appearing for defendant, and the Court having read and considered the pleadings, and briefs of the parties and the arguments of counsel, and being fully advised in the premises, FINDS and ORDERS as follows:

Plaintiffs are members of the Wyoming Libertarian party, and are residents of the State of Wyoming. Defendant is the Secretary of State for the State of Wyoming, and has been sued in her official capacity only. Plaintiffs brought this action under 42 U.S.C. Section 1983, alleging that various provisions in the Woming Election Code, W.S. Sections 22-1-101 et. seq. (1977), violate their constitutional rights under the First and Fourteenth Amendments to the United States Constitution, and seek injunctive relief. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1331. The Court has jurisdiction over the parties and the subject matter of this action, and venue is properly in the United States District Court for the District of Wyoming. There are no genuinely disputed issues as to any material fact, and it is appropriate for this Court to determine this matter upon the cross motions for summary judgment filed herein.

Standard of Review.

Plaintiffs challenge the validity of W.S. Sections 22-1-102(g), 22-5-201, 22-5-209, 22-5-212, 22-5-215, 22-5-301, 22-5-303, 22-5-304, 22-5-305, and 22-5-307 of the Wyoming election Code, alleging that such provisions unduly and unnecessarily restrict plaintiffs' right to ballot access. The threshold issue of this case is the level of judicial scrutiny to which said provisions may be subjected. Defendant has not denied that such challenged provisions implicate fundamental rights secured by the First and Fourteenth Amendments. Ballot access restrictions burden two fundamental rights protected by the Constitution, the right to political association, and the right to cast votes effectively. Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. 173, 184(1979), citing Williams v. Rhodes, 393 U.S. 23, 30 (1968). The Supreme Court has held that when such

vital individual rights are at stake," the tate must establish a "compelling interest" nd must "adopt the least drastic means to chieve [its] ends." Illinois State Board of lections v. Socialist Workers Party, supra at p. 184-185; Arutunoff v. Oklahoma State lection Board, 687 F.2d 1375, 1381 (10th Cir. 982, J. Seymour dissenting); McLain v. Meier, 37 F.2d 1159, 1163 (8th Cir. 1980); American arty of Texas v. White, 415 U.S. 767, 780-781 1974).

However, no hard-and-fast general rule or tandard exists by which to measure state allot access laws. Arutunoff v. Oklahoma tate Elections Board, supra at p. 1379. Each ase must be resolved on its own facts, after ue consideration is given to the practical ffect of election laws of a given state, iewed in their totality. Clements v. ashing, 457 U.S. 957 (1982). The Court hould conduct a careful examination of the hallenged statute, and determine whether or

not the statute may withstand close scrutiny. The statute should be upheld if the Court determines it advances compelling state interests, that it accomplishes important state goals, and that it does not unduly burden constitutional rights of political parties and their members. However, if the Court determines the statute is unnecessarily oppressive, it should declare it to be unconstitutional. Id.; McLain v. Meier, 637 F.2d 1163.

Challenged Provisions of the Wyoming Election Code:

W.S. Section 22-1-102(g) (1977) defines the term "political party," stating "'Political party' is a party whose candidate for representative in the congress [sic] of the United States received at least ten percent (10%) of the total vote cast at the last preceding election." Candidates for partisan political offices are either nominees of such "political

parties," or are deemed to be "Independent candidates," which is defined by Section 22-1-102(f) as "a person who is running for nomination or election to a public office but who does not represent a political party."

Section 22-5-101 provides for only two means by which a candidate may be nominated for partisan offices filled at a general election. One is by primary election under Sections 22-5-201 to 22-5-215, which is only available to "political parties" as defined above. A political party at a primary election may nominate an entire slate of candidates for public office for the next subsequent general election without being required to show any modicum of support for any individual nominee. Section 22-6-101. The other means is by nomination as an independent candidate through a petitioning process provided in Sections 22-5-301 to 22-5-308. In order to obtain ballot access by petition each potential candidate must file a

eparate petition supported by signatures of egistered electors numbering at least five 5%) of the numer of votes cast for represen- ative in congress in the last general elec- ion in the political subdivision for which he petition is filed. Section 22-5-301. uch petitions may be circulated for signa- ures only during the calendar year in which he election for the office sought is to be eld. Section 11-5-305(a). The petition must e filed not more than ninety (90) days nor ess than forty-five (45) days before a eneral or special election. Section 22-5- 07. If a potential candidate succeeds in btaining ballot access sunder Sections 22-5- 01 to 22-5-308 he will be listed as an inde- endent candidate upon the partisan general lection paper ballot. Section 22-6- 20(a)(vii). Candidates nominated by polit- cal parties through primary elections are isted on said ballot according to party ffiliation, which affiliation is clearly set

rth upon the ballot. Sections 22-6-0(a)(vi), 22-6-116, 22-6-121.

No other means for ballot access in rtisan general elections are provided in the oming Election Code. Thus, by implication, new political party, or a minor political rty, may obtain party access to the ballot ly by the following means:

(A) Such party must file a petition on half of their candidate for representative Congress supported by signatures of regis-red electors numbering at least five percent the number of votes cast for representative Congress in the last general election for e State of Wyoming at least forty-five (45) ys prior to the next general election.

(B) Such party's candidate for representa-ve in Congress, who will be designated as an dependent candidate upon the partisan gen-al election ballot, must receive at least r percent of the votes cast for such office the general election.

(C) At this point the party will meet the quirements of Section 22-1-102(g) and will come a "political party" within the meaning the Wyoming Election Code. If the party en complies with the requirements set forth Chapter 4 of the Wyoming Election Code ncerning election of officers and central mmittees, conventions and other meetings, ch minor party will be entitled to conduct imary elections two years later prior to the xt general election (barring a special ection) and will be entitled to sponsor a ll slate of candidates, to adopt a party atform, and to have its candidates desig-ted by party affiliation upon the partisan neral election ballot for such general ection.

Furthermore, members of minor political rties are required to register as indepen-nts or nonpartisans under the provisions of e Wyoming Election Code unless and until the nor party obtains "party" status pursuant ot

the procedures set forth above. Sections 22-3-103, 22-3-104(a), 22-6-101, 22-6-108. Until such time members of minor political parties are designated as independents or nonpartisans upon the official electors registry lists. Section 22-3-108(a)(iv).

The most notable feature of the Wyoming Election Code in this regard is the absence of any current means by which a new or minor political party may gain access to the ballot except as independent candidates. It is conceivable under the provisions of the Election Code that a new political party could foster support of 50% or even 100% of the electorate of the State of Wyoming during an election year and yet its candidates for public office would still be denominated as independent candidates upon the ballot for purposes of the next general election.

In addition to those set forth above, the following benefits inure to "political parties" under the Wyoming Election Code:

(a) The county clerk in each county is required to publish and post a notice of an upcoming primary election at the county's expense pursuant to Section 22-2-109 (1977). No similar benefit is given independent candidates.

(b) Political party central committees, and officials thereof, on request, may obtain computerized voter registration lists under Section 22-2-113(a). In addition three copies of registry lists are automatically forwarded to the county chairman for each political party ten days prior to any election. Section 22-3-109(a) (1983). A minor party may obtain computerized voter registration lists by means of a candidate's campaign committee or political action committee, Section 22-2-113(a), or may review copies of registry lists posted publicly within the county courthouse. Section 22-3-109(b). However, as was noted above, such lists designate electors either as nonpartisans or according to party

affiliation, if declared. Similarly the state abstract prepared after each general election breaks down voting data according to party affiliation as designated upon the registration lists. Section 22-16-116. Section 22-3-108(a) (iv). Thus, the minor party is left with the distinct disadvantage of having to find means by which to ascertain which electors, identified as nonpartisans, in fact are aligned with its position, and which are not.

(c) Candidates for public office who are affiliated with a recognized "political party" may file an application for nomination or election prior to a primary election without being required to file supporting signatures of qualified electors as is required with independent candidates. Section 22-5-204(a). Such filing must be made at least fifty-nine (59) days before the date of the next subsequent primary election. Section 22-5-209 (1983).

(d) The board of county commissioners is required to notify the county chairman of each political party concerning proposed changes in precinct boundaries, or of proposed consolidation or division of precincts at least one month and fifteen days prior to adoption of the proposal, and is further required to send a certified copy of resolutions adopting such changes to such chairman at least five days after adoption of the same. Sections 22-7-102, 22-7-103. All other interested persons, including minor party members, receive notice under the general requirement that proposed changes be published in a newspaper of general circulation within the county once a week for three consecutive weeks prior to the first meeting at which such proposals will be taken up. Section 22-7-102.

(e) Judges of election and counting boards and alternatives are selected by the board of county commissioners in each county solely from lists of registered resident electors

submitted by the county chairman of each political party, and serve a term of at lest two years after their selection. Section 22-8-101, 22-8-102, 22-8-104. Each political party is assured equal party representation among judges of election or counting boards. Sections 22-8-108(b), 22-8-109. Independent candidates and minor parties are not permitted to nominate electors for such positions.

(f) Before preparing a voting machine, or an electronic voting device for an election the county clerk of each county is required to give written notice to the county chairman of ech political party having a candidate on the ballot stating the time and place where such machine or device will be prepared. Representatives of the political party are entitled to be present to have the machine or device prepared in their presence and to verify proper preparation by signing the seal placed upon the envelope containing the keys to machines which have been tested, prepared,

locked and sealed. Sections 22-10-108(a), 22-11-104(b) (111), 22-10-109(a), 22-10-110. Independent candidates may also be present and are also entitled to have the machine prepared in their presence, and to sign such envelope. However, no notice requirement is set forth pertaining to independent candidates.

(g) The county chairman of each political party is authorized to certify challengers to serve in each precinct. Section 22-15-102. Similarly a county canvassing board is comprised of the county clerk and two (2) electors who must be members of different political parties who are appointed by the board of county commissioners. Section 22-16-101. Such canvassing board is vested with substantial authority under the Wyoming Election Code. Accord, Sections 22-16-102 to 22-16-120. Independent candidates and minor parties are not permitted to nominate electors for such positions.

(h) Should a vacancy in the office of epresentative in Congress occur under the rovisions of the Wyoming Election Code the tate central committees of the respective arties are entitled to nominate an elector ualified to hold such office as their candiate to fill such office for the unexpired erm, Section 22-18-106. By implication an ndependent candidate may also obtain ballot ccess for such office. Section 22-18-107. owever, no means by which access may be obained is specifically set forth, and therefore it must be presumed that an independent andidate may obtain access only by the etition procedure set forth in Sections 22-5-01 to 22-5-308. However, under Section 22-8-107 the petition must be completed and iled, along with suporting signatures, within wenty (20) days after the vacancy is eclared. Furthermore, a candidate for the nexpired term may only seek election as a andidate of the political party in which he

was registered on the date the vacancy occurred. Section 22-18-108.

(i) Should a vacancy in the office of a member of the State Legislature occur, the county central committee of the political party to which the last incumbent belonged is authorized to select three persons qualified to fill the vacancy as its nominee to fill the office for the unexpired term. Such names are then transmitted to the board of county commissioners who must then appoint one of the three nominees to fill the vacancy. Section 22-18-111 (1983). No apparent means exist within the Election Code to fill vacancies in such offices previously held by incumbents who were not affiliated with a recognized political party.

(j) The state convention of each political party nominating candidates for President and Vice President of the United States is authorized to nominate the party's candidates for presidential electors, the names of which

are then filed with the secretary of state. Section 22-19-102. Should a vacancy in the nomination for the office of presidential elector occur, vacancy may be filled by the state central committee of the political party by certifying the name of the person filling the vacancy with the secretary of state. Section 22-19-105. No apparent means exist within the Wyoming Election Code whereby an independent candidate or unrecognized minor political party may nominate presidential electors, or may fill vacancies in such positions.

(k) (1) A recognized political party is authorized to raise, collect and expend money, or other things of value on behalf of its candidates for public office and is also authorized to aid in the election of its candidates for public office. 22-25-102(a), (b). An unrecognized minor political party may undertake these activities only through the vehicle of a "political action committee"

or a "candidates campaign committee." Id. Such committees may be formed, however, through simple filing procedures. Section 22-25-101(b). The Code sets ceiling limits upon contributions to a candidate, or to his campaign committee, but does not limit contributions to political parties, and does not limit expenditures by a political party made on behalf of candidates it supports or sponsors. Section 22-25-101(c), (e) (1983).

(2) The Code establishes accounting and reporting requirements concerning campaign related receipts, expenditures and obligations for any candidate in any election. Sections 22-25-103 to 22-25-114. Noncompliance with such provision subjects offenders to criminal charges, and to the risk of forfeiture of the candidate's certificate of nomination or of election if the candidate won the election. Sections 22-25-105, 22-25-108, 22-25-114. Generally speaking such provisions are equally applicable whether a candidate is affiliated

with a political party or is classified as an independent candidate. However, the provision makes various distinctions between party affiliated and independent candidates which tend to make the reporting requirements for independent candidates more onerous than those for party affiliated candidates. Staff and postage expenses and, in most cases, advertising expenses incurred by a political party central committee while promoting its candidates are not "identifiable expenses" as the term is defined by the Code. Sections 22-5-103(a), (b), and (c). Thus, such expenses need not be set forth in a party-candidate's financial report. Section 22-25-106(a). The same rule does not apply to "political action groups" or to a "candidate campaign committee." Reports filed by political action committees or by candidate campaign committees must be filed under oath by both the chairman and treasurer of the committee. Section 22-25-106(c). Reports filed by political party

central committees need not be filed under oath. Section 22-25-106(d). The report of a political action committee or candidate campaign committee, if it pertains to more than one candidate, must attribute receipts, expenditures or obligations to each candidate itemized separately. Section 22-25-106(c). However, a report of a political party's central committee need not attribute expenses except where such expenses can be specifically identified to a specific candidate to the exclusion of other candidates on the ticket. Section 22-25-106(d). Finally, political action committees must continue to file financial reports every six months until all debts incurred in a campaign are paid. Section 22-25-106(b). Upon payment of all debts the committee automatically terminates. Id. Conversely, no ongoing reporting requirements are established for political parties, and, obviously, a political party does not automatically terminate upon payment of debts

incurred in a campaign, and thus need not refile for recognition prior to each new campaign.

It is true that a variety of sections within the Wyoming Election Code indicate that its drafters intended that minor parties could obtain recognized party status under its terms. Sections 22-6-114, 22-6-118(a), 22-6-120(a)(viii), 22-10-110(a) (ix), 22-11-104(a), but we must conclude that most provisions within the Code assume the existence of a two-party system consisting of Democratic and Republican parties. Sections 22-4-117, 22-5-303, 22-8-108(b), 22-13-104(a).

Balancing Analysis.

Defendants have not denied that the ballot access provisions in question implicate Plaintiffs' fundamental rights secured by the First and Fourteenth Amendments. Nor do the plaintiffs deny that the State of Wyoming sought to further legitimate State interests

through the restrictions upon ballot access challenged herein. Reasonable classifications which turn upon the political party's success in prior elections, and level of support requirements are not invalid per se. Arutunoff v. Oklahoma State Election Board, supra at p. 1378. A state furthers its important interests when it requires a demonstration of a modicum of support for a party before granting official recognition. Id. at p. 1379; Clements v. Fashing, supra; Jenness v. Fortson, 403 U.S. 431, 442 (1971). Such requirements protect the efficiency of election processes, protect against frivolous or fraudulent condidacies, avoid the expense and burden of run-off elections, and avoid voter confusion which may result from overcrowded ballots. Id. ; Williams v. Rhodes, supra.

However, notwithstanding this interest, a state's election laws cannot operate to freeze the political status quo.

> "They must recognize that there is a constant fluidity in the fortunes of

> political parties particularly minor parties. The courts have invalidated state ballot access laws that are oppressive and make it virtually impossible for any but the two major parties to achieve ballot positions for their candidate." Arutunoff v. Oaklahoma State Election Board, supra at p. 1378.

See also, Illinois Elections Board v. Socialist Workers Party, supra; American Party of Texas v. White, supra; Storer v. Brown, 415 U.S. 724 (1974); Kusper v. Pontikes, 414 U.S. 51 (1973); Lubin v. Panish, 415 U.S. 709 (1974).

After reviewing the provisions of the Wyoming Election Code, and especially those sections challenged herein, the Court is constrained to conclude that the challenged provisions cannot withstand close scrutiny. Indeed, substantial benefits accrue to political parties recognized under the Wyoming Election Code, although they are accompanied also by substantial responsibilities and obligations. Yet, while the State has an undeniably legitimate interest in regulating party status under the Election Code, the challenged

provisions for minor party ballot access are unduly burdensome. Much less burdensome and equally effective means of obtaining such State interests could have been used. The practical effect of the access provisions challenged herein is to make it virtually impossible for minor parties to obtain ballot access in the year of a general election, and thereby to freeze the political party status quo. No realistic or practical means of current ballot access is provided to minor political parties. In effect, the Code establishes a filing date two years and forty-five days in advance of the first general election in which a minor party could have its name printed upon the general election ballot, and then the party must twice demonstrate a modicum of support, first, by obtaining signatures of registered electors supporting the petition of its candidate for representative in Congress, and subsequently by having its candidate for representative in Congress, and subsequently

by having its candidate for representative in Congress capture ten percent of the vote cast for such office as an independent candidate rather than as a minor party candidate. Thus, it would take a minor party over two years to qualify for ballot access at the next election after that time period.

Several courts have set aside ballot access restrictions which are much less onerous than these provisions. In McLain v. Meier, supra, a North Dakota filing deadline for minor parties ninety days in advance of a primary election was held to be unnecessarily oppressive. In Reagan, et al. v. State of Kansas, et al, C82-4083 (D. Kan. June 16, 1983), Kansas statutes requiring petitions showing support by signatures equal to 3% of the votes cast in the latest gubernatorial election be filed to gain party access, but requiring such petitions be signed and circulated only by electors from the same precinct so as to preclude effectively circulation of petitions

within public areas were held unnecessarily oppressive. In Baer, et al v. Meyer, et al, 82-C-29 (D.Colo. January 10, 1984), Colorado provisions allowing electors to register in the name of minor parties, and granting the right to a minor party candidate's party affiliation printed upon the ballot, but denying the right to hold primary elections, or to sponsor a full ticket of candidates without individual petitions, and further denying other benefits afforded "recognized parties" in the absence of a showing of support similar to that required by W.S. Section 22-1-102(g) were held unnecessarily oppressive. In Libertarian Party of South Dakota, et al v. Kundert et al, Civ. 83-3071 (D. S.D. January 25, 1984), a South Dakota requirement that electors signing new party petitions state that they have affiliated one with another for the purpose of forming the party, and that they intend to register for such party and to nominate candidates for public office was held

unnecessarily burdensome. Accord, Anderson v. Mills, 664 F.2d 600, 609-610, (6th Cir.1982); North Carolina Socialist Workers Party v. North Carolina Board of Elections, 538 F.Supp. 864 (E.D. N.C. 1982). These authorities and other cases persuade the Court that less onerous means are available to accomplish the State's legitimate interest, and that the State of Wyoming cannot be permitted to continue to infringe unduly and unnecessarily upon plaintiffs' First and Fourteenth Amendment rights.

Defendant relied primarily upon the holding in Arutunoff v. Oklahoma State Election Board, supra. However, the Oklahoma provisions considered in that action were much less onerous than those challenged herein. O.S.A. Section 1-108 provided that a minor political party may, at any time except between July 1 and November 15 of an election year, organize a recognized political party. To do so the party must notify the secretary of the state

election board of its intent to do so in writing. Within ninety days after filing such notice the minor party must file petitons supported by signatures numbering five percent of the number of total votes cast in the last general election for either Governor or President and Vice President. Signatures upon each page are to be limited to registered voters from a single county. Upon review by the state election board, should the petition be determined to be sufficient, the minor party becomes recognized under the laws of the State of Oklahoma with all rights and obligations accruing thereto.

Under the election laws of Oklahoma, should a recognized party's candidate for Governor, or for electors for President and Vice President, fail to receive ten percent of the total votes cast for such office it would cease to be a recognized political party. O.S.A. Section 1-109. At this point the secretary of each county election board was required to

change each of the party's registered voters to independent status upon registry lists. O.S.A. Section 1-110. However, even though a political party has ceased officially to exist because of its failure to meet the ten percent retention requirement, its members thereafter could still regain party recognition prior to the next general election by following the petition procedures prescribed for the formation of new political parties under O.S.A. Section 1-108. Arutunoff v. Oklahoma State Election Board, supra at p. 1379. Thus, a minor political party in Oklahoma could gain recognized party status currently, and in each successive election year provided it could show the modicum of support required under O.S.A. Section 1-108. The Oklahoma scheme stands in stark contrast to the Wyoming scheme which provides no means at all by which a party may obtain recognized party status within the current election year. The Arutunoff decision is not controlling in this case.

While no State may be compelled to adopt the laws of another jurisdiction, Libertarian Party of Florida v. State of Florida, 710 F.2d 790, 794 (11th Cir. 1983); Blair v. Hebl, 498 F.Supp. 756, 762 (W.D. Wis. 1980), the Oklahoma statutes just mentioned do show us that means are available to the State by which it could effectively protect its legitimate interests without unduly or unnecessarily burdening plaintiffs' Constitutional rights. While adoption of a scheme similar to that used in Oklahoma could place administrative burdens upon the State, the Court believes that such administrative burdens are not substantial enough to overbalance the infringement of the Wyoming Election Code upon the plaintiffs' constitutuional rights.

The defendant urged that plaintiffs' ability to obtain ballot access as independent candidates was adequate to meet plaintiffs' interests, and that the distinction between independent and partisan status upon the

ballot is not enough to justify invalidation of the challenged provisions. But, as was noted, recognized parties under the Wyoming Election Code receive substantial benefits wholly apart from their right to have their party affiliation placed upon the partisan general election ballot. It is clearly established that "The political party and the independent candidate approaches to political activity are entirely different and neither is a satisfactory substitute for the other." Storer v. Brown, supra at p. 745; Arutunoff v. Oklahoma State Election Board, supra at p. 1380; MacBride v. Exon, 558 F.2d 443 (8th Cir. 1977). "Sometimes the grossest discrimination can be in treating things that are different as though they were exactly alike." Jenness v. Fortson, supra at p. 442. A "candidate who wishes to be a party candidate should not be compelled to adopt independent status in order to participate in the electorial process." McLain v. Meier, supra at p. 1165. A minor

political party's rights are not adequately protected where the state ". . . is willing to encourage minority political voices, but only if they are partially stripped of a legitimizing party label." Id. at p. 1165 n. 12. "A political group becoming a recognized political party and offering to the electorate a slate of candidates is far different than an individual becoming an independent candidate to run for a political office." Arutunoff v. Oklahoma State Election Board, supra, at p. 1380. We conclude that the existence of liberal ballot access provisions concerning independent candidates cannot justify unduly burdensome restrictions placed upon minor party ballot access. The Constitution requires access requirements for all parties to be reasonable. Id.; McLain v. Meier, supra.

Remedy.

The plaintiffs requested the Court to judicially notice that there is an adequate

modicum of support, and therefore to compel defendant to grant the Wyoming Libertarian Party access to the 1984 general election partisan ballot under McCarthy v. Briscoe, 429 U.S. 1317 (1976); Hall v. Austin, 495 F.Supp. 782 (E.D. Mich. 1980); McInereney v. Wrightson, 421 F.Supp. 726 (D. Del. 1976); McCarthy v. Tribett, 421 F.Supp. 1193 (D. Del. 1976); McCarthy V. Askew, 420 F.Supp. 775 (S.D. Fla. 1976); and McCarthy v. Slater, 553 P.2d 489 (Okla. 1976). While the Court will not yet do so, the Court will judicially notice the fact that the Wyoming Legislature commenced a new session on February 14, 1984. In the interest of harmonious federal-state relations, the Court will defer any ruling upon the remedial aspects of this action until the Wyoming Legislature has had an opportunity in that session to amend the Wyoming Election Code in light of the provisions of this order. Therefore it is hereby

ORDERED that plaintiffs' Motion for Summary Judgment be, and the same hereby is, granted. It is further

ORDERED that defendant's Motion for Summary Judgment be, and the same hereby is, denied. It is further

ORDERED that final judgment in this action restraining the defendant from enforcing the challenged provisions of the Wyoming Election Code shall be, and it hereby is, deferred until March 2, 1984, so that the Wyoming Legislature shall have an opportunity to amend the Wyoming Election Code in light of this order, and to provide the plaintiffs, and other minor parties, a reasonable means of ballot access.

Dated this 17th day of February, 1984.

S/Clarence Brimmer
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF KANSAS

CASE NO. 82-4083

DAN G. REAGAN, KARL E. PETERJOHN,
BILL D. EARNEST, JUDITH R. DEWHIRST,
ERVYL STEINLE, TIMOTHY J. MORIARITY,
STEVEN R. RIGGIN, and JEFFREY C. CORRICK,
Plaintiffs,

VERSUS

THE STATE OF KANSAS, and JACK H. BRIER,
Secretary of State for the State of Kansas,
Defendants.

MEMORANDUM AND ORDER

This case is brought by members of the Libertarian Party of Kansas and the National Libertarian Party. Plaintiffs claim that their first amendment rights to vote and to associate are being infringed by the operation of K.S.A. 25-205, 25-302, 25-302a, 25-303, and 25-3301. Plaintiffs also contend that these statutes operate to deny them equal protection of the laws. Plaintiffs seek a declaration that the laws are unconstitutional as applied to the facts of this case. Injunctive relief against the enforcement of the statutes is

also requested. This case is being brought under 42 U.S.C. §1983 and 28 U.S.C. §§ 2201 and 2202. Jurisdiction over this matter is authorized by 28 U.S.C. § 1343 (3), (4).

On June 9, 1982, this court, in an oral order, declared the operation of the statutes in question to be unconstitutional. The court also enjoined the enforcement of the statutes against plaintiffs and asked both sides to agree upon a new standard to govern the Kansas Libertarian Party's ballot access. This written memorandum will explain in more detail the reasons for this action.

THE OPERATION OF THE KANSAS STATUTES

Under Kansas law, K.S.A. 25-202, candidates for national, state, county and township offices may be nominated by primaries, independent nomination papers and conventions. Parties whose candidate for secretary of state did not poll at lease five percent of the total vote cast for all

candidates for secretary of state in the last general election cannot have a primary. These parties must use the convention method of nomination.

Persons registered in parties that qualify to have a primary may become a primary candidate by paying a filing fee or submitting nominating petitions. K.S.A. 25-205. "Precinct petitions" must be used. In other words, only voters from the same precinct may sign a petition circulated by a resident of that precinct.[1]

Since 1965, persons wishing to form a new political party capable of nominating candidates for Kansas public office have had to file precinct petitions with a number of signatures equal to 3% of the votes cast in the latest gubernatorial election. K.S.A. 25-

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[1]Under House Bill 3028, which passed the Kansas Legislature and was signed by the Governor, nominating petitions need not be circulated by a resident of the same precinct as the pesons signing the petition if the circulator is the candidate being nominated. This law became effective on April 29, 1982.

302a. These petitions are required to be filed sixty (60) days before June 20. Political parties with candidates on the general election ballot of 1954 or which developed in Kansas between 1954 and 1965 are permitted to nominate candidates for the 1982 general election by the primary or convention method. No showing of current popular support is required.

As of April 28, 1982, the laws governing independent candidacies in Kansas were changed. Before that date, persons wishing to run as independent candidates for state-wide offices had to submit nominating petitions signed by 2,500 persons, but "precinct petitions" were not required. Now, "precinct petitions" are required of independent candidates. Defendant's Exhibit A, House Bill No. 3028 amending K.S.A. 25-303.

Party affiliation lists are used by the State in the conduct of primary elections. K.S.A. 25-3301. Although only voters

registered as Republicans or Democrats are currently allowed to participate in primary elections, the laws under attack by plaintiffs do not expressly bar persons from registering as members of other political parties.

FACTUAL FINDINGS

From the testimony, pleadings and stipulations heard or filed with the court, we have drawn the following factual findings:

1. Plaintiffs are members of the Kansas Libertarian Party and National Libertarian Party, although they are not registered as such in Kansas.

2. Plaintiff Carl Peterjohn is desirous of being the Libertarian cnadidate for Governor in the State of Kansas.

3. Plaintiffs believe it would be virtually impossible for their party or any other party to satisfy the requirements for ballot access set forth in K.S.A. 25-302a.

4. The Kansas Libertarian Party has not initiated a petition drive in 1982 to attempt to qualify as a "new party" under K.S.A. 25-302a.

5. Some efforts have been made by Libertarian Party members to have the Kansas Legislature modify the requirements for ballot access. These efforts, however, have been unsuccessful.

6. Over 4,000 signatures were collected to place Ed Clark's name on the ballot as an independent candidate for President in 1980. Mr. Clark, a Libertarian, received 14,470 votes in Kansas while candidates offered by the Stateman, Conservative and American parties received a combined total of 3,165 votes.

7. No new party has been recognized on the Kansas ballot since 1965, although some parties have changed their names.

8. Mr. Ervyl Steinle, Treasurer of the Kansas Libertarian Party, testified that "a

couple hundred" Kansans were Libertarian Party members, although a greater number of people were Libertarian Party supporters.

9. Under the law in Kansas, before the persons may be nominated for public office as candidates of a new party, 22,088 signatures from registered voters must be collected on precinct petitions. Each petition must contain names of voters from the same precinct and must be circulated by a voter of that precinct.

10. The "precinct requirement" inhibits the collection of signatures at large public gatherings, such as shopping centers, sporting events, or college campuses. A door-to-door drive for signatures is probably necessitated by the "precinct requirement." It is more burdensome to collect signatures going door-to-door than it is to collect signatures where large groups of people congregate.

11. Kansas now has state-wide voter registration.

12. The Secretary of State is capable of checking signatures against addresses on petitions. County election officers can do this as well.

13. The "precinct requirement" is considered a protection against fraud. Signatures collected from homes by persons known to the signer are viewed, by some, to be more valid evidence of support than signatures collected by strangers in public places.

14. The Secretary of State has not been presented with a petition from a Libertarian candidate or the Libertarian Party this year.

15. A substantial number of Kansas voters are registered as Independents.

16. In 1976 and 1980, the Libertarian Party candidates for President ran in Kansas as independents rather than as Libertarians.

17. Defendant Brier has acted without malice in enforcing the Kansas election statutes in question.

STANDARD OF REVIEW

Case law involving ballot access restrictions reflects a balancing of the constitutional rights of individuals to associate for the advancement of political beliefs and to cast votes effectively against the constitutional authority of states to regulate the election process for the protection of compelling interests. In Jenness v. Fortson, 403 U.S. 431, 442 (1971), the Court recognized the States' compelling interest in requiring a showing of popular support before granting ballot access.

> There is surely an important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate on the ballot--the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election.

This interest, however, does not justify measures which lead to the monopolization of the ballot by established parties. Under the holding of Williams v. Rhodes, 393 U.S. 23

(1968), states must provide practical means for new political parties and independent candidates to appear on the general election ballot.

A practical means of ballot access is one that does not unnecessarily burden the constitutional right to vote and to associate. In Illinois Elections Board v. Socialist Workers Party 440 U.S. 173, (1979), the Court held that:

> When such vital individual rights are at stake, a State must establish that its classification is necessary to serve a compelling interest. American Party of Texas v. White, 415 U.S. 767, 680-81 (1974); Storer v. Brown, 415 U.S. 724, 736 (1974); Williams v. Rhodes, supra, at 31. To be sure, the Court has previously acknowledged that States have a legitimate interest in regulating the number of candidates on the ballot... .
>
> However, our previous opinions have also emphasized that "even when pursuing a legitimate interest, a State may not choose means that unnecessarily restrict constitutionally protected liberty," Kusper v. Pontikes, 414 U.S. 51, 58-59 (1973), and we have required that States adopt the least drastic means to achieve their ends. Lubin v. Panish, supra, at 716; Williams v. Rhodes, supra, at 31-33.

Id. at 184-85.[2]

The Supreme Court has been criticized for not articulating "a coherent approach to determining the constitutionality of ballot access schemes." Developments in the Law--Elections, 88 HARV.L.REV. 1111, 1134 (1975). The Eighth Circuit has noted: "Ballot access statutes are not susceptible of easy analysis, nor is the appropriate standard of review always easy to discern." McLain v. Meier 637 F.2d 1159, 1163 (8th Cir.1980). Part of the problem centers upon the use of the "least drastic means" standard. We agree with those courts that have observed in cases where the Supreme Court has found ballot access restrictions to be unconstitutional, this finding has been premised upon the absence of

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[2]The Court also emphasized that this requirement is "particularly important where restrictions on access to the ballot are involved [because] [t]he States' interest in screening out frivolous candidates must be considered in light of the significant role that third parties have played in the political development of the Nation." Id.

a compelling reason for the restriction or the excessive burdens the restriction placed on political participation. Commoner v. DuPont, 501 F.Supp. 778, 783 (D. Del. 1980), see also, Anderson v. Celebrezze, 664 F.2d 554, 563 (6th Cir. 1981). In other words, we do not believe the "least drastic means" language that appears in some Supreme Court opinions on ballot access, requires us to identify the least burdensome method by which the State can achieve its legitimate objectives.

In this case, we have decided to apply the standards articulated by the Fourth Circuit Court of Appeals in Anderson v. Morris, 636 F.2d 55, 57 (4th Cir.1980):

> In determining the validity of a ballot access restriction, we perceive that we must consider two factors: first, is the restriction necessary to serve a substantial state interest, and, second, if so, is it unduly burdensome on the right of any independent or third party candidate to gain access to the ballot.

See also, Mathers v. Morris, 515 F.Supp. 931 (D. Md. 1981) aff'd, 649 F.2d 80 (4th Cir.

1981), cert. denied, --- U.S. --- ( ); McCarthy v. Austin, 423 F.Supp. 990, 997-99 (W.D. Mich. 1976).

CONCLUSIONS OF LAW

Under Kansas law, parties established before 1965 may place candidates on the general election ballot without exhibiting any current popular support, while parties established after 1965 are required to file "precinct petitions" contained 22,088 signatures. No substantial state interest has been demonstrated to the court to justify this difference in treatment which, in 1980, granted ballot access to old parties with candidates less popular than new parties' candidates that were forced to run as independents. The State has argued that this statutory restriction shoud be viewed in the context of more liberal means of independent candidacy and the potential for write-in votes. The Supreme Court has clearly held,

however, that: "The political party and independent candidate approaches to political activity are entirely different and neither is a satisfactory substitute for the other." Storer v. Brown, supra, 415 U.S. at 745. It has also rejected write-in candidacies as a constitutionally meaningful means of ballot access. Williams v. Rhodes, supra, 393 U.S. at 37. Moreover, the availability of ballot access via an independent candidacy or write-in candidacy does not rationally explain the difference in ballot access afforded to old and new parties. In sum, we conclude the Kansas statutes must be determined to be invalid as they apply to the Kansas Libertarian Party because the statutes do not satisfy the first factor listed in Anderson v. Morris, supra.

It is unnecessary to consider whether the Kansas statutes under attack are unduly burdensome on the right of the Kansas Libertarian Party to gain ballot access. It

is clear, however, that the statutes do place an excessive burden on the Libertarian Party's ballot access when the burden is compared with the burden placed on old parties. We also need not consider whether the ballot access provisions would be unconstitutional if they were applied to all parties. The absence of a "new party" candidate on a Kansas general election ballot since 1965, however, is persuasive evidence in support of such a proposition. See Mendel v. Bradley, 432 U.S. 173, 177-78 (1977); Storer v. Brown, supra, 415 U.S. at 742.

RELIEF

We hereby declare that defendants, albeit without malice, have acted unconstitutionally to deny plaintiffs the full measure of their first amendment rights and their right to the equal protection of the laws in violation of 42 U.S.C. §1983. Therefore, we enjoin defendant Brier from enforcing the Kansas

statutes impeding the ballot access of plaintiffs.

Justice Powell, acting as Circuit Justice, wrote in McCarthy v. Briscoe, 429 U.S. 1317, 1322-23 (1976):

> In determining whether to order a candidate's name added to the ballot as a remedy for a State's denial of access a court should be sensitive to the State's legitimate interest in preventing "laundry list" ballots that "discourage voter participation and confuse and frustrate those who do participate." Lubin v. Panish, 415 U.S. 709, 715 (1974). But where a State forecloses independent candidacy in Presidential elections by affording no means for a candidate to demonstrate community support, as Texas has done here, a court may properly look to available evidence or to matters subject to judicial notice to determine whether there is reason to assume the requisite community support.

In the instant case, we believe the best way to respect the State's interest in establishing proper procedures to assure sufficient community support is to give the State and plaintiffs an opportunity to agree upon a level of support which must be demonstrated before ballot access will be

attained. In our oral order enjoining the enforcement of the Kansas statutes attacked by plaintiffs, we granted both sides 10 days to reach such an agreement. If no agreement is reached, the court shall consider the factors described by Justice Powell in fashioning appropriate equitable relief for plaintiffs. See Hall v. Austin, 495 F.Supp. 782, 788-92 (E.D. Mich. 1980).

CONCLUSION

Accordingly, the Court hereby orders, adjudges, and decrees 1) that K.S.A. §§ 25-205, 25-302, 25-302a, and 25-303, are constitutionally deficient as applied to plaintiffs herein and violative of their rights under the first and fourteenth amendments of the Constitution; 2) that defendant Brier is enjoined from enforcing these statutes against plaintiffs; and 3) that both sides endeavor to agree by June 21,1982 upon a level of popular support which must be

shown by the Kansas Libertarian Party for ballot access and a deadline for such a showing.

IT IS SO ORDERED.

Dated this 16th day of June, 1982, at Topeka, Kansas.

S/Richard D. Rogers
UNITED STATES DISTRICT JUDGE

LOUISIANA STATUTES INVOLVED

La. R.S. 18:441 Recognition

A political party shall be recognized in this state if one of its candidates for presidential elector received at least five percent of the votes cast in this state for presidential electors in the last presidential election, or if at least five percent of the registered voters in the state are registered as being affiliated with the political party. A party which receives more than five percent but less than ten percent of the votes cast in the last presidential election shall not be entitled to representation on a parish board of election supervisors.

La. R.S. 18:551 Ballots

A. Preparation. The secretary of state shall prepare and certify the absentee ballots and the ballots to be used on the voting machines in primary and general elections.

B. Titles of offices. The titles of the offices to be voted on in a primary or general election shall be printed on the ballot in capital letters in the following order:

(1) President and vice-president.

(2) State offices--governor, lieutenant governor, secretary of state, attorney general, treasurer, superintendent of education, commissioner of agriculture, commissioner of insurance, commissioner of elections, United States senator, United States representative, justice of the supreme court, judge of a court of appeal, member of the public service commission, member of another state board or commission, and any other state office.

(3) Local offices--state senator, state representative, district judge, district attorney, judge of a parish court, sheriff, clerk of court, assessor, coroner, police juror, judge and marshal of a city court, member of a school board, member of other

local boards and commissions, justice of the peace, and other local offices.

(4) Municipal offices--mayor, chief of police or marshal, alderman or member of a city council, member of a municipal board or commission, and other municipal offices.

(5) Political party offices--member of a state central committee, member-at-large of a parish executive committee, and member of a parish executive committee from a political subdivision.

When a special election to fill a newly-created office or a vacancy in an existing office is held at the same time as a regularly scheduled election, the secretary of state may print the titles of the offices to be voted on in the special election at the end of the ballot.

The titles of offices not specifically provided for in this Section shall be listed on the ballot in the order determined by the secretary of state.

C. Names and numbers of candidates. The names of the candidates in a primary or general election shall be printed on the ballot as follows:

(1) In a primary election only the names of candidates who qualified for election and were not subsequently disqualified by a judgment rendered in an action objecting to candidacy shall be printed on the ballot. The name of each candidate shall be printed on the ballot in the form designated by the candidate in his notice of candidacy. If a candidate has designated a nickname in his notice of candidacy, as provided in R.S. 18:463(A), the nickname shall be printed immediately preceding his surname. The names of the candidates for each office shall be arranged alphabetically by surname and shall be printed below the title of the office, in smaller capital letters. The names of the candidates shall be numbered from first to last. Once the secretary of state has assigned numbers to the candidates

on the primary election ballot, the numbers shall not be changed. If the qualifying period reopens because of the death of a candidate, additional candidates who qualify for the primary election shall be given the numbers following the number assigned to the last candidate on the ballot. If two or more candidates have the same surname, the word "Incumbent" shall be printed after the name of each candidate having the same surname who is an incumbent and the residence address shall be printed after the name of each candidate having the same surname who is not an incumbent.

(2) In a general election only the names of the candidates who qualified for election shall be printed on the ballot, and the names shall be printed in the same form as they were printed on the ballot for the primary election. The names of candidates who were elected in the primary election shall not be printed on the ballot. The names of the can-

didates for each office shall be arranged alphabetically by surname, and shall be printed below the title of the office, in smaller capital letters. The names of the candidates shall be given the same number assigned to them on the primary election ballot.

D. Political party designation. The political party designation of a candidate who is registered as being affiliated with a recognized political party shall be printed on the primary or general election ballot on the same line and immediately after or below the candidate's name. If a candidate is not affiliated with a political party, the space after his name shall be left blank.

E. Uniformity. Except as specifically authorized in this Section, no information, designation, or title shall be printed on the ballot. The names of the candidates shall be printed on the ballot in type of uniform size and style. The spaces between the names of

the candidates for each office shall be uniform, and the names of the candidates for one office shall be separated from the names of candidates for another office by sufficient space to avoid confusion.

La. R.S. 18:1259 Arrangement of ballot; designation of party candidates

A. In any year in which presidential electors are to be elected, the secretary of state shall arrange the voting machine ballot on the vertical type voting machine for that election in such manner that the names of candidates for president and vice president shall appear on the ballot in the first column, beginning at the top and proceeding downward. If necessary, the listing of the names of candidates for president and vice president may continue in the second and succeeding columns. On the horizontal type voting machine the secretary of state shall arrange the voting machine ballot for that election in such manner that the names of

candidates for president and vice president shall appear on the ballot in the first two columns, beginning with the first row. The listing of the names of the candidates shall continue downward, with each pair of candidates for president and vice president appearing in a separate row. If necessary, the listing of the names of candidates for president and vice president may continue in succeeding columns, begining with the first row and continuing downward. The names of the presidential electors shall appear on the ballot in the manner as provided for in Subsection B of this Section.

B. The ballot shall be so arranged that the names of the candidate for president and the candidate for vice president nominated by each recognized political party or by nominating petition shall appear, in fourteen point type print, together with the name of the presidential candidate on top and the name of the vice presidential candidate directly

underneath on the vertical type voting machine, and with the name of the presidential candidate on the left and the name of the vice presidential candidate directly to the right on the horizontal type voting machine. Directly to the left of the names of the presidential and vice presidential candidates on the vertical type voting machine, and directly above the names of the presidential and vice presidential candidates on the horizontal type voting machine, shall appear: (1) if nominated by a recognized political party, the name of the party and such national party emblem, if any, or state party device, if any, as the state central committee of the party shall direct, and (2) if nominated by a nominating petition, the political principal which the candidates support, as stated on the nominating petition, if any, and the words "Nominating Petition" or the abbreviation "Nom. Petition." Immediately below the name of the party, or, if nominated by a nominating

petition, the words "Nominating Petition" or the abbreviation "Nom. Petition" shall appear the word "Electors." Immediately below the word "Electors" the names of the presidential electors nominated in support of the nominees for president and vice president of that party or political principal shall appear in six point type print. There shall be a single lever or, on an absentee ballot, a single box within which to mark a cross (X), opposite each pair of names. In preparing the ballots, the secretary of state shall arrange the names of the candidates of recognized political parties alphabetically, according to the names of the parties, followed by the names of the candidates nominated by nominating petitions, listed alphabetically by designation of political principal.

C. No candidate nominated other than by a recognized political party shall use the name of any recognized political party in the political or party designation of such candidate.

D. The ballot shall contain the following statement: "A vote for candidates for president and vice president is a vote for each of the electors supporting those candidates."

NEW PARTY BALLOT ACCESS LAWS IN THE UNITED STATES

Major Requirements That A New Party Must Meet In Order For All Its Candidates For Statewide Office To Appear On The General Election Ballot With The Party Name, As Of March 1, 1984.

Note: All procedures are for signatures on a petition unless otherwise noted. Only Louisiana, Delaware, and California require a level of voter registration for new party ballot access. Washington requires a level of attendance at a nominating convention.

States which Require a Percentage of the Total Number of Registered Voters

5.0%	Louisiana (Registrations)	La. Rev. State. Ann. 18:441 (West 1979)
3.0%	Florida	Fla. Stat. Ann. 99.096(1) (West, Supp. 1983)
3.0%	Maryland	Ann. Code of Md., Art. 33 4B-1(h) (1983)
2.5%	Georgia	Off. Code of Ga. 21-2-170 b (1982)
1.0%	Hawaii	Hi. Rev. Stat. 11-62 (Supp. 1982)
.5%	Virginia	Va. Code 24.1-159 (1980, supp. 1983)
.05%	Delaware (Registrations)	Del. Code Ann. tit.15, 3001 (1981)

States which Require a Percentage of the Votes Cast in a Previous Election

5.0% Nevada	Nev. Rev. Stat. §293.128 (1983)
5.0% Maine	Me. Rev. Stat. Ann. tit. 21, §323.2 (1983)
5.0% Oklahoma	Okla. Stat. Ann. tit. 26, §1-109 (1976 West)
5.0% Oregon	Ore. Rev. Stat. §249.732(1) (Supp. 1981)
3.0% Arkansas	Ark. Stat. Ann. §3-113 (L) (1976)
3.0% Idaho	Id. Code §34-501(1)(c)D (1981)
2.5% Tennessee	Tenn. Code Ann. §2-1-104 (27) (B) (1979)
2.5% South Dakota	S.D. Codified Laws Ann. §12-5-1 (1982) amended by HB 1354 (1984)
2.0% Arizona	Ariz. Rev. Stat. Ann §16-801 (1975)
2.0% Indiana	Ind. Stat. Ann §3-1-11-1 (Burns 1982)
2.0% Massachusetts	Mass. Ann. Laws ch. 53 §6 (Michie/Law Co-op 1978)
2.0% North Carolina	N.C. Gen. Stat. §163-96(2) (1982 & Supp. 1983)
1.0% Alabama	Ala. Code §17-8-2.1 (1975, Supp. 1983)

1.0%	Alaska	Alaska Stat. §15.25.160 (1976) amended by HB 573 (1984)
1.0%	California (Registrations)	Ca. (Elec.) Code 6430(b) (Deering 1977)
1.0%	Connecticut	Conn Gen. Stat. §9-453 (d) (Supp. 1980)
1.0%	Kansas	Ks. Stat. Ann. §25-302a (1981) amended by SB 732 (1984)
1.0%	Missouri	Ann. Mo. Stat. §115.315 (Vermon's 1980)
1.0%	Nebraska	Neb. Rev. Stat. §32-526 (Supp. 1981)
1.0%	Ohio	Ohio Rev. Code Ann. §3517.01 (1981)
1.0%	Texas	Tex. Civ. Stat. (Elec. Code) art. 13.45(2)(a) (Vernon 1982)
1.0%	West Virginia	W. Va. Code §3-5-23 (1979, Supp. 1983)
.5%	New Mexico	N.M. Stat. Ann. §1-8-2.B (Supp. 1983)
.01%	Washington (Att.)	Wash. Rev. Code Ann. §29.24.030 (Supp. 1983)

States which Require a Percentage of a Winning Candidate's Vote in a Previous Election

5.0	Montana	Mont. Code Ann. §13-10-601 (1983)
2.0%	Pennsylvania	Pa. Stat. Ann. tit. 25, §2911 (Purdon 1963 & Supp. 1983)
1.0%	Michigan	Mich. Compiled Laws Ann. §168.685 (1967, Supp. 1983)

States which Require a Specified Flat Number of Signatures

500	Utah	Utah Code Ann. §20-3-2(g) (2) (1976, Supp. 1983)
800	New Jersey	N.J. Stat. Ann. §19:13-5 (West 1964, Supp. 1983)
1,000	Iowa	Iowa Code Ann. §45.1 (West 1981)
1,000	Rhode Island	R.I. Gen. Laws §17-16-8 (1981, Supp. 1983)
2,000	Minnesota	Minn. Stat. Ann. §202A.28 (West Supp. 1983)
3,000	New Hampshire	N.H. Rev. Stat. Ann. §655:42 (1983)
5,000	Colorado	Colo. Rev. Stat. 1-4-801(b) (1983)
5,000	Kentucky	Ky. Rev. Stat. §118.315(2) (1982)

7,000	North Dakota	N.D. Cent. Code 16.1-11-30 (1981)
8,000	Wyoming	Wyo. Stat. 22-4-132 (1977) amended by Sen. File 85 (1984)
9,000	Wisconsin	Wis. Stat. Ann. 5.62(2) amended by Assembly Bill 540 (1984)
10,000	South Carolina	S.C. Code Ann. 7-9-10 (Law Co-op. 1976)
20,000	New York	N.Y. (Elec. Law) 6-142 (McKinney 1978)
25,000	Illinois	Ill. Ann. Stat. ch. 46 10-2 (Smith-Hurd 1965 & Supp. 1983)

States which Require Merely a Formal Party Organization

Mississippi	Miss. Code. Ann. 23-1-81(c) (1972, supp. 1983)
Vermont	Vt. Stat. Ann. tit. 17, 2318 (1982)

This table was prepared by Richard Winger of San Francisco, California, Ballot Access Consultant to the Libertarian Party.

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NO. 83-1917

In the Supreme Court of the United States

OCTOBER TERM, 1983

LIBERTARIAN PARTY OF LOUISIANA,
Petitioner,

VS.

JAMES H. BROWN, SECRETARY OF STATE FOR THE STATE OF LOUISIANA, AND EDWIN A. LOMBARD, CLERK OF THE CRIMINAL DISTRICT COURT FOR THE PARISH OF ORLEANS, STATE OF LOUISIANA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

May the Louisiana Legislature constitutionally require political parties to demonstrate public support before permitting the name of the party on the election ballot.

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Respondent.

ON WRIT OF CERTIORARI TO THE
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FOR THE FIFTH CIRCUIT

BRIEF OF THE RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Henry T. Dart, a member of the Libertarian Party, qualified to run for the office of New Orleans City Councilman. Dart's name appeared on the ballot in the February 6, 1982 election. Dart unsuccessfully sought to have his party affiliation follow his name on the February 6 ballot. That controversy brings this case before this Honorable Court.

Dart does not seek a writ of certiorari to the United States Court of Appeals for the Fifth Circuit. Rather, the writ is sought only by the Libertarian Party of Louisiana.

This is not a ballot access case or one in which any other fundamental right is at issue, *e.g.*, the right to vote. Dart was not denied access to the ballot. The Louisiana Election Code allows any and all candidates, regardless of party affiliation or the lack thereof, equal access to the ballot.

However, a legitimate state interest exists in requiring that a political group demonstrate that it has a modicum of support before its member be allowed to designate on the ballot that he is supported by a particular group. The Louisiana Election Code seeks to avoid election confusion, deception and frustration. To permit each individual to purport that he has "party" backing or "party" status which he in fact does not have, affects the integrity of the entire electoral process. That individual is then representing to the electorate that he has a political base of support, a modicum of community support or associational persuasiveness, which he does not have.

Further, because Louisiana has an open primary election system, any person desiring to become a candidate in a primary election may do so by timely filing a Notice of Candidacy and either a qualifying fee or nominating petition. Some candidates may be endorsed by multiple political parties and the very notion of a political party becomes indefinite without some minimal party recognition requirement.

The Louisiana Election Code does not strip a person of his party affiliation. The individual who cannot

demonstrate a modicum of support is merely characterized on the ballot as having no *recognized* party affiliation. A political party name is simply not mentioned alongside the name of the candidate. The candidate may still organize, act or espouse party views. He is *not* required to abandon his party, assume a partisan affiliation he does not desire or masquerade as an independent.

In this important area of state regulation, candidates in presidential elections are treated the same as those in state or local elections. Only those candidates nominated by a recognized political party may list the name of a recognized political party. Louisiana Revised Statutes 18:1259 C. (see Petitioner's Appendix, page 156). The rights of minor party members are protected as they may designate on the ballot the political principle they support. Louisiana Revised Statutes 18:1259 B. (see Petitioner's Appendix, pages 154-56).

Finally, the challenged Louisiana statutes are constitutional as applied. Testimony at trial clearly demonstrated that Louisiana does not seek to protect or maintain a two-party system. Testimony also showed that Louisiana law encourages new and minor parties to seek recognition and that a determination can be made by state voter registration officials at any time whether a party has achieved recognition.

The decision of the Federal District Court for the Eastern District of Louisiana and the three-judge panel of the United States Court of Appeals for the Fifth Circuit are in harmony with relevant decisions of the Supreme Court of the United States (hereinafter "Supreme Court") and other Circuit Courts of Appeals. The courts below properly applied established legal standards. As federal and state

related issues were balanced in favor of the respondent, State of Louisiana, this Honorable Court should deny petitioner's request for a writ of certiorari.

SUMMARY OF ARGUMENT

I. *The decision of the Fifth Circuit Court of Appeals is in harmony with decisions of the Supreme Court and other Circuit Courts of Appeals.*

II. *Ballot access cases require the balancing of federal and state-related issues that is better accomplished by lower courts.*

ARGUMENT

I. *The decision of the Fifth Circuit Court of Appeals is in harmony with decisions of the Supreme Court and other Circuit Courts of Appeals.*

Respondent's petition poses issues that are settled consistently by the Supreme Court and Circuit Courts.

First, it is settled that a state has a compelling interest in regulating the election process and avoiding voter confusion. *Clements v. Fashing,* 457 U.S. 957, 102 S.Ct. 2836, 73 L.Ed.2d 508 (1982); *American Party of Texas v. White,* 415 U.S. 767, 782 n. 14, 94 S.Ct. 1296, 1307 n. 14, 39 L.Ed.2d 744 (1974); *Lubin v. Panish,* 415 U.S. 709, 715, 94 S.Ct. 1315, 1319, 39 L.Ed.2d 702 (1974); *Bullock v. Carter,* 405 U.S. 134, 145, 92 S.Ct. 849, 857, 31 L.Ed.2d 92 (1972); *Jenness v. Fortson,* 403 U.S. 431, 91 S.Ct. 1970, 1976, 29 L.Ed.2d 554 (1971).

Next, it is readily apparent that a more stringent

level of scrutiny is applied where the complaining *candidate*, rather than the *party*, has been denied access to the ballot. The Fifth Circuit correctly emphasized the distinction between candidate and party access to the ballot and noted that the instant case falls in the latter category. *Dart v. Brown*, 717 F.2d 1491, 1499 and 1501 (5th Cir. 1983).

Thus, petitioner's statement that the less strict standard taken by the Fifth Circuit "is inconsistent with the more demanding standards announced" by the Supreme Court is inaccurate. Cases cited by petitioner[1] as requiring more demanding standards are dissimilar *candidate* access to ballot cases. Even then, as the Fifth Circuit notes at 717 F.2d at 1501, application of the strict scrutiny test appears clearest when other important constitutionally protected rights (such as the right to associate) in addition to candidate access are threatened.

Such additional factors are also present in the two cases cited by petitioner[2] as authority for stricter standards where *both* candidate *and* party access were involved. Moreover, in these two cases, candidates and parties were prohibited from appearing at all on the ballot. In the instant case, Henry Dart, the Libertarian Party's candidate of choice, had access to and in fact was on the ballot.

The case at bar is consistent with Supreme Court

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[1] *Bullock v. Carter*, 405 U.S. 134, 92 S.Ct. 849, 31 L.Ed.2d 92 (1972); *Lubin v. Panish*, 415 U.S. 709, 94 S.Ct. 1315, 39 L.Ed.2d 702 (1974); *Storer v. Brown*, 415 U.S. 724, 94 S.Ct. 1274, 39 L.Ed.2d 714 (1974); *Anderson v. Celebrezze*, 460 U.S. 780, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983).

[2] *Williams v. Rhodes*, 393 U.S. 23, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968); *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 99 S.Ct. 983, 59 L.Ed.2d 230 (1979).

opinions that look carefully at the effect of denying a *party* access to the ballot but do not require a more stringent standard of review. The Court has expressly refused to require a state to designate the political party of a candidate. *Jenness v. Fortson, supra,* 403 U.S. 431, 91 S.Ct. 1970, 1976, 29 L.Ed.2d 554 (1971). The Court has also upheld requirements that condition ballot access on a preliminary significant number or percentage of popular support. *Storer v. Brown, supra,* 415 U.S. at 740, 94 S.Ct. at 1284 (5% requirement not facially unconstitutional); *American Party of Texas v. White, supra,* 415 U.S. at 783 & n. 15, 788-89; 94 S.Ct. at 1307 & n. 15, 1309-10 (upholding statute imposing on minority parties "lenient" 1% requirement which was coupled with other "somewhat burdensome" requirements, and requiring independent candidates to obtain signatures of 3% or 5% depending on office); *Jenness v. Fortson, supra,* 403 U.S. at 432, 442, 91 S.Ct. at 1976 (5% of those eligible to vote in previous election is constitutional).

There is no conflict of authority between the Fifth Circuit and decisions of either other federal courts of appeals or state courts of last resort.

Petitioner states that the Fifth and Eighth Circuits are in disagreement, and cites *McLain v. Meier,* 637 F.2d 1159 (8th Cir. 1980) (hereinafter "*McLain*"). The decisions of these circuits are consistent. Further, recent opinions of the Tenth and Eleventh Circuits (uncited by petitioner) are in harmony with the Fifth Circuit. *Arutunoff v. Oklahoma State Election Board,* 687 F.2d 1375 (10th Cir. 1982), *cert. denied,* __ U.S. __, 103 S.Ct. 1892 (1983); *Libertarian Party of Florida v. State of Florida,* 710 F.2d 790 (11th Cir. 1983).

In *McLain,* the court found that the decisions of the

United States Supreme Court in the party ballot access field require some heightened scrutiny, and further found that the access statute of North Dakota there reviewed could not withstand such heightened scrutiny. Strict scrutiny as applied in race, alienage and religion cases, was not mandated.

The respondents are completely unable to discern any meaningful distinction between the treatment afforded the North Dakota ballot access statute in *McLain*, and that afforded Louisiana's ballot access statute by the Fifth Circuit in the opinion below. The Fifth Circuit, like the Eighth, did in fact undertake a hard and realistic scrutinization of the ballot access statute presented. The opinion below expressly observed that:

> "Weighing and evaluating...we conclude that the Louisiana statutes in question do not violate appellants' constitutional rights under either the First Amendment or the equal protection clause.... [T]he consequences [of Louisiana's standards for party recognition] are not severe, and appellants' ability to exercise and enjoy their rights under the First Amendment are neither clearly, directly, nor significantly impaired. Though Louisiana treats the Libertarian Party differently from some other parties, it does so solely on the basis of neutral, evenhanded criteria of general applicability....These criteria and the treatment resulting from their application are reasonably calculated and important to the furtherance of strong and legitimate interests of the State....[W]e fail to perceive any significant injury to, or invidious treatment of, appellants under the Louisiana system...."

Dart v. Brown, 717 F.2d 1491, 1510 (5th Cir. 1983).

If there exists any difference at all between these two circuit courts of appeals decisions, it is only in the fact that the Eighth Circuit disapproved North Dakota's ballot access system, whereas the Fifth Circuit has upheld Louisiana's. Yet this circumstance hardly reflects any dispute among the circuit courts regarding ballot access law. Rather, the difference in the results reached merely reflects that the North Dakota system was significantly more restrictive than that provided by Louisiana law.

In a recent comprehensive review of ballot access law provided in a decision of the Supreme Court, Justice Rhenquist observed that:

> "Far from recognizing candidacy as a 'fundamental right,' we have held that the existence of barriers to a candidate's access to the ballot 'does not of itself compel close scrutiny.' *Bullock v. Carter*, 405 U.S. 134, 143, 92 S.Ct. 849, 855, 31 L.Ed.2d 92 (1972). 'In approaching candidate restrictions, it is essential to examine in a realistic light the extent and nature of their impact on voters.' *Ibid.* In assessing challenges to state election laws that restrict access to the ballot, this Court has not formulated a 'litmus-paper test for separating those restrictions that are valid from those that are invidious under the Equal Protection Clause.' *Storer v. Brown*, 415 U.S. 724, 730, 94 S.Ct. 1274, 1279, 39 L.Ed.2d 714 (1974). Decision in this area of constitutional adjudication is a matter of degree, and involves a consideration of the facts and circumstances behind the law, the interests the State seeks to protect by placing restrictions on candidacy, and the nature of the interests of those who may be burdened by the restrictions. *Ibid., Williams v. Rhodes*, 393 U.S. 23, 30, 89 S.Ct. 5, 10, 21 L.Ed.2d 24 (1968)."

Clements v. Fashing, 457 U.S. 957, 102 S.Ct. 2836, 2844, 73 L.Ed.2d 508, 516 (1982). In light of the relatively fluid standard of heightened scrutiny endorsed by this Court and the balancing of multiple factors which is necessary in order to resolve any challenge to a state ballot access restriction, it becomes apparent that different federal courts will inevitably reach different results when examining the access restrictions imposed by different states. Indeed, the Tenth and Eleventh Circuits have recently reached the same result as the Fifth Circuit. See *Arutunoff v. Oklahoma State Election Board*, *supra*, and *Libertarian Party of Florida v. State of Florida*, *supra*, which are discussed at length below.

This inevitability is well illustrated by further comparison of the Eighth and Fifth Circuit Courts of Appeals decisions presented here. In *McLain*, there were two aspects of the North Dakota ballot access system which were found by the Eighth Circuit Court of Appeals to be most significant. These were the number of signatures required to be presented in support of the petition for initial ballot access by new political parties, and the date prior to the election by which such petition had to be filed with state authorities. 637 F.2d at 1164. Under the North Dakota statute there attacked, it was necessary for a new party seeking official recognition to submit 15,000 signatures by no later than June 1 of the election year. 637 F.2d at 1162. Therefore, the 15,000 petition signatures required for ballot access in the year represented a bit more than 5 percent of the 297,188 votes cast for presidential electors at the last preceding election, held in 1976. See, 12 AMERICA VOTES 286 (Scannon & McGilliway ed. 1977). Even though the petition signature requirement for 1978 considered by the Court in *McLain* was slightly more burdensome upon the aspiring new party (when reduced to

a percentage figure) than that which operates in Louisiana, the Eighth Circuit opinion admitted that it was arguably valid under the decisions of the United States Supreme Court, at least if viewed standing alone.

It was, therefore, only when the petition signature requirement in North Dakota was viewed in conjunction with the relatively early filing deadline that the scales of the balance tipped against the North Dakota ballot access regulation. North Dakota's deadline for the petitions was June 1, more than 90 days before the primary election and more than 150 days before the general election. *McLain v. Meier,* 637 F.2d at 1164.

In Louisiana, however, there is no rigid cut off date for registration as being affiliated with a particular party. The Louisiana Election Code does not state just when a party must have five percent of the registered voters affiliated with it in order to be a "recognized" party in a given election. This status can be achieved as late as the close of the period for candidates to qualify for a particular election. For the February 6, 1982 New Orleans City Council election in question in this case, the candidate qualifying period closed December 18, 1981 or fifty (50) days before the election. Louisiana Revised Statutes 18:402D, 467(4), 468.

The additional time permitted to minor political parties to garner the registration necessary for qualification for recognized party status under Louisiana law provides a distinction between North Dakota law and Louisiana law which is far more than merely theoretical. It provides a fairly clear explanation of why the balancing process conducted by the two circuit court of appeals produced different outcomes.

Other features in *McLain* noted by the Fifth Circuit panel that led to a different outcome included Louisiana's unwillingness to require nominees to adopt an independent status or to otherwise publicly espouse a variant political philosophy as well as the Louisiana statute's effect of permitting full ability to vote for the candidate of one's choice. 717 F.2d at 1500-1.

References must be made to Tenth and Eleventh Circuit Court cases holding in the same manner as the Fifth. The Oklahoma statute underlying the decision of the Tenth Circuit in *Arutunoff v. Oklahoma State Election Board, supra*, imposed the significantly later filing deadline for ballot access petitions of July 1. That date is less than 60 days before the primary election. The court refused to impose any definitive general review standard but deemed the election scheme to withstand even close scrutiny. 687 F.2d at 1379. In accord, *Baer v. Meyer*, 728 F.2d 471 (10th Cir. 1984) (court looked to whether the means adopted were unfairly or unnecessarily burdensome and required state to list party affiliation on voter registration forms as is done in Louisiana).

In *Libertarian Party of Florida v. State of Florida, supra*, the Eleventh Circuit confirmed the many Supreme Court cases finding that states have a compelling interest in regulating the election process and avoiding voter confusion, and stated the following standard of review:

> Thus, the test is whether the legislative requirement is a rational way to meet this compelling state interest. The least drastic means test becomes one of reasonableness, i.e., whether the statute unreasonably encroaches on ballot access. See *Anderson v. Celebrezze*, 460 U.S. at __ & n. 9, 103 S.Ct. at 1570 & n. 9 (1983) (state's important

> regulatory interests are generally sufficient to justify reasonable restrictions).

710 F.2d at 793.

The Louisiana election scheme tallies party registration figures and the Florida election code counts numbers on a petition. However, neither code freezes or stifles changing political affiliation. As noted by the Fifth Circuit below:

> Party affiliation registration or change thereof is not a burdensome procedure under Louisiana law, and it may be accomplished at any time. There are no limits on how frequently one may change registered party affiliation, nor any minimum time which must elapse between changes. Registered party affiliation does not affect the right to vote or run in any election or to sign nominating petitions for candidates. There is no evidence that procuring the requisite number of party registrants is significantly more difficult than procuring a like number of signatures of registered voters on a petition requesting party recognition.

717 F.2d at 1507. Thus, the Louisiana Election Code in like manner to that of Florida provides a reasonable means of access.

What remains most clear is that the Fifth, Eighth, Tenth and Eleventh Circuit Courts have each conducted the necessary balancing and each reached conclusions which are sustainable under the differing circumstances. It follows that there exists no split of authority among the circuit courts. The Fifth Circuit is also in harmony with the

Supreme Court and there is no conflict which would justify an exercise of jurisdiction by the United States Supreme Court.

II. *Ballot access cases require the balancing of federal and state-related issues that is better accomplished by lower courts.*

It has been the consistent and sound policy of the Supreme Court to decline to grant petitions for writs of certiorari in cases which tend to be resolvable more upon their own peculiar facts than upon an application of principles of law. *See* e.g., *United States v. Johnston*, 268 U.S. 220, 227, 45 S.Ct. 496, 69 L.Ed. 925 (1925); *Southern Power Co. v. North Carolina Public Service Co.*, 263 U.S. 508, 509, 44 S.Ct. 164, 68 L.Ed. 413 (1924).

Yet it may be that there is no field of constitutional doctrine where cases are more likely to turn upon their own peculiar facts and circumstances than the field of ballot access law. This was expressly recognized by Justice White's opinion in the case of *Storer v. Brown*, 415 U.S. 724, 730, 94 S.Ct. 1274, 1279, 39 L.Ed.2d 714 (1974), where the Court observed that:

> "It is very unlikely that all or even a large portion of the state election laws would fail to pass muster under our cases; and the rule fashioned by the Court to pass on constitutional challenges to specific provisions of election laws provides no litmus-paper test for separating those restrictions that are valid from those that are invidious under the Equal Protection Clause. The rule is not self-executing and is no substitute for the hard judgments that must be made. Decision in this context, as in others, is very much a 'matter of

> degree', [citation omitted] very much a matter of 'consider[ing] the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification.' [citation omitted] What the result of this process will be in any specific case may be very difficult to predict with great assurance."

In accord, *Anderson v. Celebrezze*, 460 U.S. 780, 103 S.Ct. 1564, 1570, 75 L.Ed.2d 547 (1983).

The requisite balancing of the relevant facts and circumstances, with proper application of the level of scrutiny allowed by the decisions of this Court, has been conscientiously undertaken and performed by both the United States District Court for the Eastern District of Louisiana and the United States Court of Appeals for the Fifth Circuit. As this Court observed in the case of *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275, 69 S.Ct. 535, 538, 93 L.Ed. 672 (1949):

> "A court of law, such as this Court is, rather than a court for correction of errors in fact finding, [a court that] cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error."

The Libertarian organization in Louisiana has not been denied official political party status because Louisiana ballot access restrictions are unduly burdensome. Rather, they have been denied such status because of the nearly total absence of popular support for their organization among Louisiana voters. 717 F.2d at 1497. All of the factors relevant to this situation have been fully analyzed

and balanced by both of the lower courts which have considered the matter. Accordingly, there is no proper basis for further consideration of such matters by this Court.[3]

CONCLUSION

Petitioner has not established that the lower courts failed to utilize a proper standard of review in evaluating the constitutionality of Louisiana's ballot requirements for minor political parties, or that the Louisiana Election Code unconstitutionally denied ballot access to those parties. A state may constitutionally require political parties to demonstrate public support before permitting the name of the party on the election ballot.

The decisions of the courts below are in harmony with relevant decisions of the Supreme Court and other Circuit Courts of Appeals. The courts below properly applied established legal standards. Finally, federal and state related issues were balanced in favor of the respondent, State of Louisiana. This Honorable Court should deny petitioner's request for a writ of certiorari.

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[3] The petition for writ of certiorari asks the Supreme Court to take judicial notice of certain 1982 elections in Louisiana and introduces for the first time an unverified and unauthenticated table prepared by a plaintiff member alleging to show nationwide registration requirements. This "information," *if* accurate, is outside the record and should be ignored.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the above and foregoing Respondents' Brief in Opposition to Petition for Writ of Certiorari have been served on the parties required to be served under Rule 28 of the Rules of the United States Supreme Court this 9th day of August, 1984.

MAUREEN FERAN FREEDLAND